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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation,
Petitioner,

vs.

ALICE BENNER, Administratrix of the Estate of William H. Benner, Deceased,
Respondent.

No. 897

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Missouri

and

BRIEF IN SUPPORT THEREOF.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, Petitioner, vs. ALICE BENNER, Administratrix of the Estate of William H. Benner, Deceased, Respondent.	No. .....

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Terminal Railroad Association of St. Louis, a corporation, and respectfully petitions this Honorable Court to grant and to issue its writ of certiorari directed to the Supreme Court of Missouri (hereinafter referred to for convenience as the court below), directing it to send to this Court for review its opinion and judgment rendered and entered on October 30, 1941, rehearing in which was refused December 12, 1941, in this cause, lately pending in the court below, styled Alice Benner, Administratrix of the Estate of William H. Benner, deceased, respondent, v. Terminal Railroad Association of St. Louis, a Corporation, appellant, No. 37,598, on the docket of the court below, affirm-

ing a judgment of the Circuit Court of the City of St. Louis, Missouri, in said cause in favor of respondent and against your petitioner herein.

OPINION OF THE COURT BELOW.

The opinion of the court below in said cause of Alice Benner, Administratrix of the Estate of William H. Benner, Deceased, respondent, v. Terminal Railroad Association of St. Louis, a corporation, appellant, which is by this petition sought to be reviewed, appears on pages ... to ..., inclusive, of the printed transcript of the record filed herewith, but has not yet been published in advance sheets or bound volumes of Southwestern Reporter, or official reports of the Supreme Court of Missouri.

JURISDICTION OF THIS COURT.

The action here sought to be reviewed, having been brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), the jurisdiction of this Court is based upon Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 937, Title 28, U. S. C. A., Sec. 344, providing for review in this Court by certiorari of decisions of the highest courts of several states wherein a title, right, privilege or immunity especially set up are claimed under a statute of the United States. Authorities sustaining the jurisdiction are: Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. ed. 1062; Minneapolis, St. P. & S. S. M. R. Co. v. Goneau, 269 U. S. 406, 46 S. Ct. 129, 70 L. ed. 335; Gulf, M. & N. R. Co. v. Wells, 275 U. S. 455, 48 S. Ct. 151, 72 L. ed. 370; Atlantic Coast Line Co. v. Davis, 279 U. S. 34, 49 S. Ct. 210, 73 L. ed. 601; Steeley v. Kurn et al., 313 U. S. 256, 61 S. Ct. 934.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This action was commenced and maintained by the respondent under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65) to recover against petitioner damages sustained by her and her children as a result of the death of her husband, William H. Benner, on May 5, 1941, during his employment as a switchman of petitioner, from injuries sustained while in the scope of his employment. The claim is that on April 30, 1941, Benner, while talking over one of petitioner's telephone lines, received an electric shock which caused his death.

Respondent pleaded general negligence and relied upon res ipsa loquitur (R. 2, 3, 4).

On April 30, 1940, Benner alighted from his train for the purpose of telephoning yardmaster Jenkins for orders respecting the next train movement (R. 9). The telephone instrument which he was using was inside a box attached to a pole (R. 10, 17). At that time it was storming, thundering and lightning (R. 12).

While Benner was at the telephone instrument the locomotive engineer of his crew saw the receiver of the telephone drop (R. 13); but he at no time saw the telephone receiver in Benner's hand (R. 13). The engineer saw also that Benner's hands were hanging down, but he could not tell whether or not his arms were stiff (R. 17); Benner's eyes were bulging and although he had rather large eyes the engineer thought they looked somewhat larger than usual (R. 12); Benner's mouth was working, but because of the distance the engine was from Benner and the noise it was making the engineer could not tell whether or not Benner was talking and, if so, what he was saying. He could not have heard what Benner was saying even under

normal conditions, had there been no thunder or lightning storm (R. 12). Some three minutes afterwards the engineer saw Benner pick up the telephone receiver, but the engineer at no time, either before or after the telephone receiver dropped, saw Benner ring the telephone (R. 19).

However, the undisputed evidence of the yardmaster, Jenkins, is that upon that occasion Benner called him by telephone and received orders for the next movement of his train. During that conversation there was a clicking noise in the telephone, whereupon Benner asked yardmaster Jenkins if he had felt that, and upon being told by Jenkins that he had not felt anything decedent informed Jenkins that he (Benner) had received a shock (R. 125). There was but the one telephone conversation between decedent and Jenkins upon this occasion, and there was no appreciable break in it (R. 127).

Upon returning to the locomotive decedent asked the engineer, "Did you see the lightning strike the pole?" Upon receiving a negative answer decedent replied, "I got a shock" (R. 12). About forty-five minutes later decedent told switchman Nicholson that he had received a shock while using the telephone. Nicholson asked him if he had received the shock from the receiver, whereupon decedent replied, "Fire—fire come down the pole" (R. 135). He also told others that he had received a shock while telephoning (R. 133, 148). After he had been sent to a doctor decedent told the doctor that he had been talking over a telephone and that the wires had been struck by lightning (R. 108).

Within an hour or an hour and a half subsequent to the incident above described, Benner began to manifest symptoms of lack of nervous and physical control, such as difficulty of speech, movement, enunciation, etc. (R. 134, 138, 148). He was sent to a hospital, rapidly developed a com-

plete paralysis of the right side of the body, and died five days after the alleged electric shock (R. 9, 21).

The telephone which Benner used was equipped with a lightning arrester and fuses to protect the user from shock by electricity (R. 168, 169). This equipment was standard for that purpose (R. 169). In the lightning arrester there are two small carbons a short distance apart, which an electric spark must bridge and which leave marks upon the carbons the size and nature of which are determined by the severity of the electrical impulse. Examination of the carbons of the lightning arrester attached to this telephone disclosed a few minor burns (R. 168). These burns were described by respondent's expert witness as "incipient" (R. 238). This witness, upon his first examination of the carbons with the naked eye, could not discover any evidence whatever of the burns (R. 235), but upon examining the carbons with a magnifying glass found some "incipient" burns (R. 238).

A post morten was had upon the body of the decedent both by the Coroner's physician, as a matter of public duty, and by one Siebert, a pathologist for respondent. The former discovered a "minute, diffused, subarachnoid haemorrhage" in the occipital or rear portion of the brain (R. 30). This means a very small amount of haemorrhage, scattered through the area between two of the membranes covering the brain proper (R. 30) The coroner's physician found also that the brain was edematous, which means that there was an abnormal increase in the fluid content of the brain tissue, which he said was due to the haemorrhage just mentioned (R. 38). The coroner's physician further testified that the fact that Benner had this haemorrhage would not indicate "to the slightest degree" that he had received an electric shock (R. 46). He expressed the further opinion that a microscopic examination

accompanied by the use of special stains would not only disclose whether or not the brain had received an electric shock, but would even determine whether that shock was caused by direct or alternating current (R. 47). The testimony of respondent's other pathologist, Dr. Siebert, was to the effect that his post mortem disclosed a group of brain changes, which indicated electrocution (R. 52, 53). He admitted, however, on cross-examination, that each and all of these changes resulted from various causes other than electric shock (R. 66, 67, 68, 69). He stated also that in many electric death cases "no changes whatever are found in the body" (R. 51); and that "electric injuries can occur without any demonstrable changes in the brain and result in paralysis" (R. 72).

Petitioner's medical evidence disclosed that an examination of the microscopic slides prepared by respondent's expert Siebert did not disclose any evidence of electric shock (R. 177, 178, 179, 183, 185).

The undisputed evidence of petitioner's experts, both Dr. Harris and Dr. O'Leary, was to the effect that the haemorrhage found in decedent's brain had occurred not longer than twenty-four hours (R. 205), and possibly not longer than six hours prior to death (R. 183, 185). Respondent's pathologist Siebert testified that the haemorrhage had occurred before death, but did not state how long before (R. 69). He did say, however, that "areas of degeneration would show a body reaction against them in the five days" (R. 69).

Respondent's medical evidence further showed that the initial injury to the brain tissue, from which everything else, including death, resulted, was the subarachnoid haemorrhage, which directly produced the oedema and, in turn, all of the other pathological conditions (R. 37, 39, 40, 43, 44). The exact language of the coroner's physician is

that "in his opinion the haemorrhage in the brain caused all the other things that followed" (R. 44).

Respondent's theory necessarily is that the haemorrhage **immediately** followed the alleged electric shock. Her evidence is that (as above stated) the first step in the sequence was the haemorrhage; this blocked circulation in the brain and thus increased the fluid content of the brain (oedema), which in turn created intracranial pressure, followed by still further blocking of blood and liquid circulation, to such extent as to produce paralysis and death. The first symptoms of paralysis were evidenced within an hour or an hour and a half after the telephone incident (R. 134, 138, 148).

But petitioner's uncontradicted medical evidence shows as a medical fact (as distinguished from medical opinion) that nature always tries to reorganize haemorrhaged tissue within from six or twelve hours (R. 30, 183, 184, 185) to twenty-four hours (R. 203), because nature considers blood out of its regular channels a foreign substance, and within a few hours after its escape begins an effort to "reabsorb or take away that foreign substance" (R. 205). This principle is conceded by respondent's expert, Siebert, who says "these areas of degeneration would show a body reaction against them in the five days between this man's alleged injury and his death" (R. 68, 69).

At the time of Benner's alleged shock he was talking to yardmaster Jenkins, who not only was not injured, but was not even shocked (R. 125, 126, 127), although talking over a telephone instrument connected to the same wire as was the telephone instrument through which Benner was talking.

An examination of the telephone, fuses, lightning arrester, ground wire, etc., disclosed no defect whatever in any of them (R. 158, 168), nor any evidence that more than a very light charge of electricity had passed through

the telephone or its appurtenances; so light, in fact, that respondent's expert had to use a microscope to discover the burns on the carbons (R. 238).

The construction of the telephone instrumentality was, first, the telephone wire, next the fuses, next the lightning arrester, next the communication wire. Attached to the lightning arrester, but not to the telephone instrument, was a wire from the arrester to the ground plate (R. 151, 152), to which the arrester shunted any abnormal electrical charge.

The appurtenances were standard equipment (R. 150, 160, 168, 169). Respondent's electrical expert testified there "is a very much better block (lightning arrester) that has been on the market for—since 1924 or 1925" (R. 226). He refused, however, to state the arrester in use was obsolete (R. 232); and admitted the carbons in question did not disclose that any high voltage charge of electricity had passed through these carbons (R. 235). He had to use a magnifying glass to discover "incipient" burns on the carbons (R. 238), after having failed to see them when during his cross-examination he used no magnifying glass (R. 235).

It will be remembered that the first evidence of abnormality displayed by Benner was disturbed muscular function, rather than loss of consciousness. The undisputed evidence discloses that when the first manifestation of abnormality is disturbance of consciousness, the doctors think of a break in the wall of a blood vessel, but when paralysis or disturbed muscular function occurs first, they think of the blocking of a blood vessel (R. 92, 93), because, while both produce haemorrhage, the former is of greater extent and produces it in a very short time, while the latter is smaller in area and the symptoms slower in manifesting themselves. Respondent's theory of the cause of Benner's death is thrombosis or embolism in what is known as the internal capsule of the brain (R. 88, 89, 98).

The internal capsule is that portion of the brain near the center of the cerebrum and is no more than the particular section of the brain through which the nerve pathways of the surface of the brain (as distinguished from the covering membranes) pass and converge towards their connection with the spinal cord (R. 90). These nerves cross over to the opposite side of the body, so that the left half of the brain controls the right half of the body and vice versa (R. 90). In other words, the nerve centers which control certain bodily functions are scattered over the surface of the brain, but each finds a pathway towards the internal capsule through which they pass to the spinal cord. Necessarily, as they approach from the widely separated areas of the brain surface, they converge until they reach the spot where they are practically gathered into one bundle or mass. This point is the internal capsule.

The blocking of a blood vessel by a thrombus, embolus or haemorrhage in the internal capsule will, therefore, cause a much greater disturbance of bodily functions than would an injury of the same dimensions at some other portion of the brain where the nerve fibers are widely separated. In view of the failure of the evidence to show any injury to the surface nerve centers of the brain which control bodily movements, petitioner's medical experts were of the opinion that the trouble must have been in the internal capsule.

Neither Dr. Connor nor Dr. Siebert, respondent's medical experts, discovered any abnormality in the internal capsule (R. 31, 77). Dr. Connor stated that he saw grossly no abnormality in the internal capsule, but that he would not have seen it in any event, unless he had made a microscopic examination (R. 31). Dr. Siebert testified that he made no microscopic examination of internal capsular tissue (R. 64, 65), because his gross examination disclosed no abnormality and there was, therefore, no necessity for a microscopic examination (R. 77). Thus, we have one of respondent's experts saying that nothing but a microscopic exam-

ination would reveal an abnormality in the internal capsule, and the other says that because no abnormality could be seen by the naked eye, there was no necessity for the microscopic examination. Nevertheless, Dr. Siebert, expressed the opinion that the seat of the trouble was not in the internal capsule.

The undisputed evidence further showed that the areas of the brain surface controlling the physical movements of the body are located near the top, but in front of, a line drawn through the brain almost vertically, at approximately the middle, and not the occipital portion of the brain where the haemorrhage was found by Dr. Connor.

QUESTIONS PRESENTED.

I.

Whether in an action under the Federal Employers' Liability Act (U. S. C. A., Title 45, Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), for damages for death, the res ipsa loquitur doctrine is applicable under any circumstances, for the reason that the action is one between employer and employee.

II.

Conceding the applicability of res ipsa loquitur, is petitioner's uncontradicted and undisputed evidence sufficient to overcome the factual inference created by res ipsa loquitur and to require a directed verdict for petitioner?

(a) Is respondent's evidence sufficient to show her decedent was killed by some form of electricity, either from:

(1) The medical evidence; or

(2) The factual evidence?

(b) If it is, is it sufficient to show the electricity reached Benner as a result of petitioner's negligence?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

By its opinion herein rendered October 30, 1941, the court below holds that res ipsa loquitur is applicable in a case prosecuted under the provisions of the Federal Employers' Liability Act. This is not a new holding of the court below. Williams v. St. L.-S. F. R. Co., 337 Mo. 667, 85 S. W. (2d) 624, 625; Noce v. St. L.-S. F. R. Co., 337 Mo. 689, 85 S. W. (2d) 637, 641.

This Court has (as we interpret its decisions) announced a contrary doctrine, and in later cases has said the application of the doctrine is disputable. Some of the Circuit Courts of Appeals have held the doctrine applicable in this character of cases, and some have held contra. There is the same contrariety of opinion among the highest state courts. Unquestionably there is serious disagreement on the question among the Circuit Courts of Appeals as well as the state courts of last resort. Necessarily this results in a situation which produces victory for one or the other of the parties litigant, depending not upon the law itself, but wholly upon the forum, one of the principal reasons this Court, in Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, overruled Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865. This question is of great public importance because of the widespread enlargement of the res ipsa loquitur principle so as to include situations never formerly considered as sufficient to invoke the doctrine, and the uncertainty now existing as to its application. This should be remedied, and only this Court can do that.

II.

The medical evidence relied upon by respondent to show Benner died from electric shock is wholly insubstantial,

highly speculative, and upon analysis wholly fails to support respondent's theory. The sine qua non of liability is proof that the haemorrhage (claimed as the first happening in the sequence of events leading to death) occurred immediately following an electric shock. The evidence of petitioner shows the haemorrhage occurred at most not more than twenty-four hours before death, whereas the alleged electric shock occurred five days prior to death. Respondent has in no way denied this evidence.

III.

Respondent's evidence is wholly insufficient to show Benner received a fatal shock of electricity through the telephone: (1) The fuses were not blown, (2) the lightning arrester was not damaged, (3) the telephone was not rendered inoperative, and (4) the person in telephonic connection with Benner at the time it is claimed he (Benner) was shocked, was not only not injured, but felt no shock at all.

IV.

If it shall be conceded solely for the sake of argument that Benner received an electric shock through the telephone, the evidence of respondent is wholly insufficient to show that such shock resulted from petitioner's negligence. Petitioner's electrical evidence discloses that there is no known method of preventinng heavy charges of electricity from passing through a telephone instrument (R. 152, 160, 169). This is not denied by respondent's electrical witnesses. This condition, of course, applies especially with respect to preventing lightning from passing through a telephone instrument; but, of course, given the same voltage and amperage, from man-made electricity, the same result would necessarily follow. The evidence in this case introduced by petitioner negatives the idea that lightning struck the telephone instrument directly, whereas dece-

dent's own evidence supports the lightning theory. All of the evidence of both parties shows that if such had been the case, the damage to the telephone instrument and its appliances would have been very severe, whereas the uncontradicted evidence discloses that the telephone instrument operated normally for a long period subsequent to Benner's alleged shock. However, as above stated, Benner's own statements on the same evening that he is alleged to have been shocked indicated that he thought he had received a shock from lightning (R. 12, 108, 135).

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court, addressed to the Supreme Court of Missouri, directing that Court to certify to this Court, on a day certain to be therein named, a full and complete transcript of the record of the proceedings in said cause of Alice Benner, Administratrix of the Estate of William H. Benner, respondent, v. Terminal Railroad Association of St. Louis, a corporation, appellant, that court's No. 37,598, to the end that said judgment of said Court may be reviewed by this Court, as provided by law, and that upon such review the judgment of said Supreme Court of Missouri in said cause, dated October 30, 1941 (the petition for rehearing denied December 12, 1941), be reversed and that petitioner have such other relief as to this Court shall seem appropriate.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri, in the case of Alice Benner, Administratrix of the Estate of William H. Benner, Respondent, v. Terminal Railroad Association of St. Louis, a corporation, Appellant, filed on October 30, 1941, has not yet been published anywhere, but will be found on pages ... to ..., inclusive, of the printed transcript of the record herewith filed.

STATEMENT OF CASE.

The pertinent facts have been fully stated in the preceding petition for writ of certiorari. They will not, therefore, be again stated here, except such as may be necessary in connection with the presentation of the argument which follows.

SPECIFICATIONS OF ERROR TO BE URGED.

In its opinions filed herein on October 30, 1941, the court below committed error as follows:

(1) In holding that the doctrine of res ipsa loquitur is applicable and effective in this case.

(2) In refusing to apply to this case the general rule of the federal courts that where the evidence of one party to an action is uncontradicted, unimpeached, and not violative of any physical law, or where his evidence is so overwhelmingly contrary to that of his adversary, the Court is bound to direct a verdict in his favor, for the reason that a verdict contrary to such evidence could not be permitted to stand.

(3) In holding that petitioner's evidence herein, which is uncontradicted, unimpeached and not violative of any physical law, is insufficient to require a directed verdict in petitioner's favor.

SUMMARY OF ARGUMENT.

I.

The opinion of the court below holds squarely that a servant may maintain an action under the Federal Employers' Liability Act in reliance solely on the doctrine of res ipsa loquitur. This holding is contrary to the decisions of this Court.

Patton v. T. & P. R. Co., 179 U. S. 658, 21 S. Ct. 275, 45 L. ed. 361, 364;
Looney v. Metropolitan R. Co., 200 U. S. 480, 26 Sup. Ct. Rep. 303, 50 L. ed. 564;
N. O. & N. E. R. Co. v. Harris, 247 U. S. 367, 38 S. Ct. 535, 62 L. ed. 1167.

(a) These decisions have been so interpreted by other courts, both federal and state.

F. W. Martin v. Cobb, (8) 110 F. (2d) 159, 163, and cases cited;
Phillips Petroleum Co. v. Manning, (8) 81 F. (2d) 849;
Smith v. P. R. Co., 239 F. 103;
Petition of McAllister, 53 F. (2d) 495, 501;
President Wilson, 5 F. Supp. 684;
Kief v. C. M. & St. P. R. Co., 263 F. 529;
American Car & Foundry Co. v. Schachleweich, 229 F. 559;
Mont Briand v. C. M. & St. P. M. & O. R. Co., 191 F. 988;
New York etc. R. Co. v. Bierbacher, 110 Ohio St. 173, 143 N. E. 570;
St. L. etc. R. Co. v. Dorman, 205 Ala. 609, 89 S. 70.

(b) However, there appears language in some of this Court's decisions creating doubt of the correctness of this

interpretation placed upon the Patton, Looney and Harris Cases, and indicating the question is still open in this court.

M. & St. L. R. Co. v. Gotschall, 244 U. S. 66, 37 S. Ct. 598, 61 L. ed. 995;
Great Northern R. Co. v. Wiles, 240 U. S. 444, 448, 60 L. ed. 732, 734.

II.

(a) As disclosed in the summary statement of the matter involved, supra, petitioner's evidence respecting the time of the happening of the haemorrhage (which respondent's theory must embrace as the commencement of the chain of causation between the alleged electric shock and its fatal consequences) as being no more than twenty-four hours before Benner's death, is wholly uncontradicted. It must, therefore, be accepted as true. Consequently, the conclusion that the haemorrhage did not result from electric shock is inescapable, because Benner manifested abnormal symptoms within an hour or hour and a half after the alleged telephone shock—four days before the haemorrhage occurred. Under the well-established rule of this Court governing the direction of verdicts, petitioner was entitled to an instructed verdict in the trial court, and the court below erred in refusing to so hold.

Small v. Lamborn, 267 U. S. 248, 45 S. Ct. 300, 69 L. ed. 597;
Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. ed. 720;
Southern Ry. Co. v. Walters, 284 U. S. 190, 194, 52 S. Ct. 58, 76 L. ed. 239;
Pa. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. ed. 819.

(b) Respondent's evidence as to other medical questions is so wholly insubstantial and self-contradictory as to

make petitioner's contrary evidence so overwhelming as to require a directed verdict in its favor.

See authorities last above cited.

(c) The undisputed evidence shows indubitably that Benner received no electric shock of any consequence while using the telephone. No damage was done to the fuses, the lightning arrester, any of the wires or the telephone instrument. Moreover, at the very moment it is alleged decedent received the shock, he was talking to yardmaster Jenkins, who felt no shock.

See authorities, supra (a);
Kuhlman v. Water, Light & Transit Co., 307 Mo. 607, 271 S. W. 788, 797;
Harter v. Colfax Electric Light & Power Co., 124 Iowa 500, 100 N. W. 508.

III.

(a) This Court's rule governing the direction of verdicts applies even though this were a case involving the res ipsa loquitur doctrine.

Gray v. M. & O. R. Co. (7), 24 F. (2d), l. c. 673, 674;
May Department Stores v. Bell (8), 61 F. (2d) 830, and cases cited.

(b) It is true that this Court has not as yet ruled directly upon this exact question. However, it has ruled on two analogous questions, viz., the inference of negligence created by statutes of certain states upon the happening of a casualty, and the inference against suicide which arises in certain actions upon life insurance policies.

(1) It will not be questioned that the inference created by res ipsa loquitur is an inference of fact rather than a presumption of law. The same is true of the inferences of negligence against railroad companies and of fraud upon

a bank's failure, created by certain statutes. This Court holds unequivocally that a statute which makes such an inference binding upon a jury is unconstitutional.

Western Atlantic R. Co. v. Henderson, 279 U. S. 639, 49 S. Ct. 445, 73 L. ed. 884;
Mobile J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 L. ed. 78.

The Supreme Court of Georgia, in Snead v. State, 165 Ga. 44, 53, and the Supreme Court of Arkansas, in Heard v. Arkansas Power & Light Co., 147 S. W. (2d) 362, 364, drew the exact analogy, saying that the statutes involved in those cases, which created rebuttable inferences, did no more than does res ipsa loquitur.

(2) The inference against suicide is a strong one, but, like the inference created by statute, is completely overcome by evidence contrary to it. This Court has so declared in the following cases:

New York Life Ins. Co. v. Gamer, 313 U. S. 161, 171, 58 S. Ct. 500, 83 L. ed. 726;
Del Vecchio v. Bowers, 296 U. S. 280, 56 S. Ct. 190, 80 L. ed. 229;
Lincoln v. French, 105 U. S. 614.

IV.

Conceding, for the sake of argument only, that Benner was killed by an electric shock, there is no evidence that he was caused to receive it through defendant's negligence. The undisputed evidence shows the fuses and lightning arrester were standard equipment and were reasonably safe and suitable. That is sufficient to show no negligence by petitioner.

Southern Pacific Co. v. Seley, 152 U. S. 145, 153, 38 L. ed. 391, 395;
C. & N. W. R. Co. v. Bower, 241 U. S. 470, 473-474, 60 L. ed. 1107, 1109.

ARGUMENT.

I.

No doubt this Court has noticed in cases based upon the Federal Employers' Liability Act, the very sharp increase in the number bottomed upon res ipsa loquitur and violations of one or more of the Safety Appliance Acts. The upturn is too sharp and the number too great to be explained by coincidence or by a lesser degree of care on the part of employers. Employers do not suddenly become wantonly careless. The reason is to be found by searching elsewhere.

At the present time the reports of both state and federal court decisions teem with res ipsa loquitur cases, although this Court said, in M. & St. L. R. Co. v. Gotschall, 244 U. S. 66, 373 Ch. 598, 61 L. Ed. 995:

> "Negligence may not be inferred from the mere happening of an accident, **except under the most exceptional circumstances.**" (Emphasis this Court's.)

This is a positive, categorical statement of a principle which is undeniable. The doctrine arose as a rare exception to be applied with extreme caution, the reason for which is not difficult to find. While, as a matter of technical law, the burden of proving negligence even in a res ipsa loquitur case, remains upon plaintiff, nevertheless, as a matter of practice, the application of the doctrine places the burden of disproving negligence upon defendant. The trial court may charge a jury day after day that the burden of proving negligence rests upon plaintiff, yet, if he also charges at the same time that the jury has a right to "infer" negligence from undisputed facts (the fact of plaintiff's injury and the circumstances under which it occurred are practically always undisputed) unless the jury finds and believe "from other facts and circumstances in

evidence" (R. 248) that defendant was not negligent, the **practical** effect, as distinguished from the legal effect is that the jury understands that the burden of disproving negligence rests upon defendant. This theory is, of course, directly contrary to the American concept of justice, and is consonant only with the present European trend of judicial action which "prefers the interests of some to others, according to its measure of values," instead of securing "the interests by reparation and the like, treating all individuals as equal"; and which abandons "the idea of culpapibility in favor of an idea of security in which the interests of those who suffer injury without fault of others are given a higher value" (Dean Roscoe Pound, American Bar Association Journal, Volume 27, page 138, March, 1941).

Instead of the res ipsa loquitur doctrine's being a rare exception not to be applied "except under the most exceptional circumstances," it is in full favor whenever astute counsel is unable to fancy or prove negligence on defendant's part. Moreover, it is being broadened constantly.

It is recognized that this Court should not be expected to announce a governing principle more than once, whereupon it becomes the duty of all other courts to follow that principle. Like many other theories, it sounds excellent; but suppose other courts refuse to follow the holding of this Court. Are litigants to be penalized because theoretically the other courts **must** follow this Court's holding, although they actually refuse to do so? That is the unfortunate position petitioner now occupies.

There is a sharp division of opinion among the various Federal Circuit Courts of Appeals, as well as the highest state courts, as to whether or not the res ipsa loquitur theory ever applies to an action between servant and master, some of it occasioned by different interpretations of opinions of this Court.

This Court, in Patton v. T. & P. R. Co., 179 U. S. 658, 21 S. Ct. 275, 45 L. ed. 361, 364, stated the rule as follows:

> "The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence."

In the later case of New Orleans and N. E. R. Co. v. Harris, 247 U. S. 367, 38 S. Ct. 535, 62 L. ed. 1167, 1171, this Court reaffirmed the doctrine announced in the Patton case in an action based upon the Federal Employers' Liability Act, where this Court said:

> "The Federal courts have long held that where suit is brought against a railroad for injuries to an employee resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish" (citing the Patton case, supra).

(a), (b) Some of the courts interpret the Patton case as indecisive because it was written before the passage of the Federal Employers' Liability Act. But, after all, that act contains nothing which would in any way diminish or increase the res ipsa loquitur rule as it stood at common law. Moreover, although the Harris case was based upon that act, this Court reaffirmed the doctrine, citing the Patton case. But the courts which desire to apply the doctrine put what we consider a strained construction upon the language of this Court in both the Patton and Harris Cases, both of which announce a broad principle which excludes application of the res ipsa loquitur principle in cases of this kind. See authorities, supra, Summary of Argument, I (a), (b).

However, some comfort is given to these courts which have (as we see it) misinterpreted this Court's language in the Patton and Harris Cases, by what this Court itself

said in Great Northern R. Co. v. Wiles, 240 U. S. 444, 448, 60 L. ed. 732, 734, which, too, was an action under the Federal Employers' Liability Act, where, speaking of the applicability of the res ipsa loquitur doctrine, this Court said:

> "The application of the doctrine to cases like that at bar is disputable. Patton v. Texas & P. R. Co., 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Looney v. Metropolitan R. Co., 200 U. S. 480, 486, 50 L. ed. 564, 568, 26 Sup. Ct. Rep. 303, 19 Am. Neg. Rep. 627. We, however, do not have to go farther than to indicate the dispute. The case at bar is not solved by the doctrine."

The Patton and Looney Cases are in agreement. This Court cited none in disagreement with them, and indicated in no way how the disagreement came about. There is no case from this Court in disagreement with the Patton, Harris or Looney Cases. The most that can be said of this Court's decisions is that the latest one (Wiles Case) recognizes that whether or not the doctrine applies in this character of case is disputable. Conceding that to be true, then obviously there must be a contrariety of opinion on the question. If so, the question should be promptly and finally determined, because it is difficult to conceive a more important question of railroad law, considering the great number of cases filed every year. There is but one forum where the question may be decisively determined. The public importance of such a determination is manifest. The Patton and Harris Cases (as we and many courts read them) pass upon the question; but there seems to be doubt about the holdings there announced which calls for settlement by this Court.

Moreover, as the decisions now stand plaintiff succeeds or fails in cases of this character not because the law is for or against him, but because he tries his action in a par-

ticular court. The undesirability of this condition prompted this Court in Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, to overrule Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865, a decision which had stood for a great many years. This question is of almost, if not equal, importance to the question in the Erie Case.

II.

(a) From a medical viewpoint is respondent's evidence sufficient to make a prima facie case under the rules of this Court respecting the direction of verdicts? So long as this action proceeds under a federal statute it is obvious that the federal rule governs as to the sufficiency of respondent's evidence to present a jury question, even though Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, be strictly followed. Willis v. P. R. Co. (2), 122 F. (2d) 248, 250; O'Brien v. Western Union Tel. Co. (1), 113 F. (2d) 539.

The rule of this Court is clear, certain and specific that, where defendant's evidence "is undisputed, or of such conclusive character that if a verdict were returned" for plaintiff "it would have to be set aside in the exercise of a sound judicial discretion, a verdict may and should be directed for" defendant. See authorities under Summary of Argument, II, (a).

Respondent's theory is (of necessity) that Benner's death was the direct and proximate result of a subarachnoid haemorrhage produced by an electric shock. It follows this pattern: (1) haemorrhage, (2) oedema (excess fluid in the brain tissue) resulting from a blocking of brain circulation by the haemorrhage, (3) intracranial pressure (following this blocking of circulation and further increasing the fluid circulation, thereby building up such

intracranial pressure as to produce) (4) paralysis, and eventually (5) death (R. 44).

It will be recalled that the haemorrhage was scattered and tiny (R. 25), called "petechial" haemorrhage, which is so extremely small as sometimes to be invisible to the naked eye, respondent's Dr. Siebert said (R. 66). This haemorrhage occurred in the occipital portion of the skull and brain (R. 24). Respondent's own medical testimony shows that this is not the portion of the brain which contains the nerve centers which control the movements of the arms, legs, toes, fingers, etc. (R. 37). There was no haemorrhage in those centers (R. 37). Nevertheless, respondent's Dr. Connor testified that the paralysis resulted from this haemorrhage (R. 44). In other words, the haemorrhage was first both in sequence and causation. That it was the beginning of the chain of brain changes resulting in Benner's death is the foundation of respondent's case. Unless that haemorrhage was directly caused by electric shock there is a break in the chain of causation wholly fatal to respondent's case.

Because the undisputed evidence shows that Benner within an hour or an hour and a half after the telephone conversation manifested symptoms of brain disturbance, such as numbness in his hand (R. 134), difficulty in breathing (R. 138), "fumbling" while trying to make out a time slip (R. 138), difficulty in enunciation, mumbling and talking about "Ross and teaching" (a wholly incoherent remark) (R. 148), the necessary conclusion is that the condition which **caused** Benner's death began to manifest itself within an hour or an hour and a half after the telephone conversation. If it was the haemorrhage, then obviously that must have occurred prior to the manifestation of the symptoms of brain disturbance noted last above. What is the evidence on this question?

Dr. Connor, who made the first post-mortem examination, did not speak on this subject. Dr. Siebert, who made the second post-mortem examination, refused to say **when** the haemorrhage had occurred except that the degenerative brain changes (which **must** have resulted from this haemorrhage to make respondent's case stand up) occurred ante mortem (R. 69). He added, however, that "areas of degeneration would show a body reaction against them in the five days between this man's alleged injury and his death" (R. 69). The only inference to be drawn from this evidence is that there had been no body reaction and, therefore, these degenerative changes had occurred **less** than five days before. How much less? The answer is found in the testimony of two medical men who testified for petitioner. The fact that there is a body reaction is shown by respondent's evidence just mentioned. What that body reaction is appears from the uncontradicted testimony of Dr. Harris:

> "When blood escapes from the blood vessels it bebecomes, as far as the body is concerned, a foreign body, and the effort to get rid of that is started by nature within a comparatively few hours after the damage to the tissue. Now, that is an effort on the part of nature to absorb or reabsorb or take away that blood which has escaped from the blood vessels, and that is done in a very particular manner in any part of the body" (R. 205).

In his opinion the haemorrhage had occurred not more than twenty-four hours prior to death (R. 205). Dr. O'Leary thought the haemorrhage had occurred not more than twelve or even six hours before death (R. 185). This evidence of Drs. Harris and O'Leary stands undenied and unchallenged. That such body reaction occurs is admitted by respondent's Dr. Siebert (R. 69). It must, therefore, be accepted as a medical **fact** (rather than **opinion**) that this effort at reorganization **is made** by the body. The

time within which this reorganization commences does not appear in respondent's evidence, but does appear in petitioner's, and is, as stated, undisputed. It must under this Court's rulings be accepted as true, else the jury would be permitted to base its verdict upon surmise and speculation and ignore undisputed testimony which is obviously not in conflict with any natural law.

Therefore, the conclusion under the undisputed evidence is inescapable that the haemorrhage did not occur until at least four days subsequent to Benner's alleged electric shock, as he was stricken April 30, 1940, and died May 5, 1940. The manifestations of injury to Benner's brain were evident at least three days before the haemorrhage occurred. It therefore becomes conclusive that the haemorrhage was **not** first in the sequence of time or causation leading to Benner's death. Necessarily then respondent failed to make a case against petitioner.

(b) Moreover, respondent's medical evidence is contradictory, self-contradictory, and wholly unreliable.

Dr. Connor testified (R. 46) that the presence of the subarachnoid haemorrhage did not "indicate to the slightest degree" that Benner had received an electric shock. Dr. Siebert, on the other hand, testified that the haemorrhage (in connection with other pathological changes) indicated electric shock (R. 52). Dr. Connor testified a gross examination of the internal capsule was not sufficient to disclose damage to it, but a microscopic examination was required (R. 31). Dr. Siebert testified a gross examination was sufficient, and gave that as his reason for not making a microscopic examination (R. 77). Dr. Connor testified (R. 47) that a microscopic examination with special stains would be necessary to determine whether or not death resulted from electric shock, and that such an examination would disclose further whether or not the electric current

was direct or alternating. But Dr. Siebert testified that he used only the standard stain and that it would and did show "any pathological change in the brain" (R. 79).

Dr. Siebert testified that the following group of pathological changes strongly indicates death from electric shock:

(1) Oedema,

(2) Petechial haemorrhages,

(3) Dilatation of perivascular spaces,

(4) Degeneration of nerve cells,

(5) Rounded or elliptical areas of disintegration of brain tissue,

(6) Marked dilatation of the small blood vessels (R. 52, 66, 67, 68).

He stated further that these six changes very definitely typify death from electric shock (R. 53), by reason of their peculiar combination (R. 52).

He admitted, however, that "there have been many electrocution deaths in which no changes whatever were found in the body. That is even true of men electrocuted on the electric chair" (R. 51). "Electrical injuries can occur without any marked changes and without any demonstrable changes in the brain and result in paralysis. We do not know why that is" (R. 72). "In an electrical injury very often there are no changes found at all in the brain, and yet paralyses are present; in other words, we don't know exactly where this occurs. We don't find any good reason for the paralysis, but, nevertheless, the patient is paralyzed. That may occur without microscopic evidence of nerve cell injury or haemorrhage or edema" (R. 72).

Thus, we find Dr. Siebert's testimony wholly self-contradictory. The syllogism would run thus: Frequently pathological brain changes do not occur from electric shock;

Benner's brain showed pathological changes; therefore, he had suffered electric shock. This conclusion is clearly a non sequitur. Dr. Siebert's testimony is thus conclusively demonstrated to be no more than pure speculation—to speak charitably of it.

Dr. Connor, testifying for respondent, stated that during his post-mortem examination he severed the cerebellum from the cerebrum (R. 29). Following his post mortem, Dr. Connor placed the brain in the abdominal cavity, where it was found by Dr. Siebert when he commenced his post-mortem examination (R. 56). The abdominal space, which is limited, was quite full. "In fact it had been necessary to press the brain somewhat to get it in the abdominal cavity," says Dr. Siebert (R. 56). Moreover, when Dr. Siebert first examined the brain, it had been sliced, not entirely through, however (R. 56). It had been embalmed and was then covered with a hard substance which he had to remove (R. 56). In spite of these facts (especially the severance of the cerebellum), Dr. Siebert testified he saw a "pressure collar" on the cerebellum (R. 52, 57). This requires an explanation. He testified further that normally the human brain is approximately the consistency of ready-to-serve Jello (R. 57). Near the middle of the brain pan or the floor of the skull is an opening through which pass the nerve fibers from the brain to the spinal cord (Abs. pp. 52, 56). If the brain has been subjected to sufficient pressure to force the bottom of the cerebellum into the foramen or the opening through which the brain fibers pass to make the connection with the spinal cord, the bottom of the cerebellum will be forced into the spinal cord doorway, or foramen. The print of the opening on the cerebellar substance is called a "pressure collar." Dr. Siebert testified that once there exists a pressure collar it will remain forever, even though the pressure shall be removed (Abs. p. 57). He testified further that he found a pressure collar on the

cerebellar portion of decedent's brain after it had been removed from the body, had been sliced by Dr. Connor, crowded back into the abdominal space at the close of Dr. Connor's post-mortem examination, had been embalmed, in which process the brain was covered with a substance which becomes quite hard, and after he had removed that substance (Abs. p. 58).

Dr. Connor did not testify that he saw a pressure collar when he made his post-mortem examination of decedent's body, but he did testify that early in his post-mortem he turned the brain over "and cut off the brain between the cerebellum and the cerebrum" (Abs. p. 29). In other words, he separated the cerebellum from the remainder of the brain.

This testimony is so completely at variance with what must be the truth, that it can be given no credence. (1) The pressure collar, he says, was on the cerebellum which had been severed from the cerebrum; (2) the cerebellum was "somewhat harder than ordinary table jello when it is ready to serve; (3) it had been crowded into the abdominal space; (4) it had been sliced partially through; (5) it had been covered with an embalming substance which had hardened; (6) Dr. Connor, who made the first post-mortem examination, did not testify to the presence of a "pressure collar." Despite these six facts (all shown by respondent's evidence), Dr. Siebert discovered on the cerebellum the imprint of the bony opening through which the spinal cord passes. This is inevitably a shocking untruth.

Dr. Siebert testified further that he made a microscopic section through the "internal capsule" (R. 59). He just as positively testified to exactly the contrary (R. 64). From page 59 of the record to and including page 64, Dr. Siebert evaded answering the direct question whether or not he had made a section directly through the "internal capsule."

When compelled to answer categorically (R. 64), his testimony was directly contrary to what he had first sworn (R. 59).

The internal capsule is located in the cerebrum, and separates the various areas of gray matter, which, together, are called the basal ganglia. There is no such thing as an internal capsule in the cerebellum (R. 97, 177). The internal capsule is the point through which the nerve pathways from the cortex pass and converge towards their connection with the spinal cord (R. 90). These nerves cross over to the opposite side of the body so that the left half of the brain controls the right half of the body, and vice verse (R. 90). In other words, the nerve centers which control certain bodily functions are scattered over the cortex, but each finds a pathway toward the internal capsule through which it passes to the spinal cord. Necessarily, as they approach from widely-separated areas of cortex, they get closer and closer together until they reach a point where they are practically gathered into one bundle. This point is the internal capsule. It may be likened to a telephone system, the nerve fibers running from the different cortical nerve centers corresponding to the telephone lines running from the homes of the different subscribers, converging and meeting at the central office. The internal capsule is the central office of the nerve fibers of the brain.

The importance of the condition of the internal capsule cannot be overestimated in the determination of this case. Petitioner's theory advanced by its medical witnesses is that, in all human probability, the damage to Benner's brain occurred in the internal capsule, probably from an embolus or thrombus (R. 88, 89), as no haemorrhage in the occipital portion of the brain could produce the hemiplegia from which decedent suffered (R. 91). It will be remembered that the onset of Benner's attack was not sudden, but gradual. Ordinarily, where a break in a blood

vessel occurs, there results a sudden disturbance in the blood pressure which at once affects consciousness. The initial symptom then is disturbance of consciousness, dizziness followed by unconsciousness. On the other hand, in case of the blocking of a blood vessel by a thrombus or embolus, there follows a lessening of blood supply producing peculiar functional sensations. When the preliminary symptom is disturbance of consciousness, a doctor thinks of a haemorrhage, but when the preliminary symptom is disturbed function, he thinks of a blocking (R. 92, 93). This evidence is uncontradicted. Because Benner showed symptoms of disturbed function rather than disturbed consciousness, and because the only haemorrhage found by Dr. Connor was in the occipital portion of the brain, away from the nerve centers controlling the movements of one side of the body, it was the opinion of Drs. Unterberg and Harrison (R. 91, 92, 93, 98) that Benner died as a result of a thrombosis or embolism in the left internal capsule. There is no claim that this lesion was caused by electric shock.

In view of this medical evidence, it is significant that Dr. Siebert made no microscopic section of internal capsular tissue. This significance is tacitly admitted and emphasized by his attempt to testify that he had done so. As already stated, every nerve fiber which passes from any portion of the cerebrum to the spinal cord passes through either the right or left internal capsule (R. 63, 64). Necessarily, a paralysis of one-half of the body involves a lesion or lesions to those nerve centers or to all of the nerve fibers which control that side of the body. This can be caused by injury to the brain tissue (nerve centers) in the cortex, which is that portion of the brain, from one to five millimeters thick, of gray color, covering the entire surface of the brain underneath the three enclosing membranes (R. 174), or in the internal capsule. The motor nerve centers

are located in the forepart, the frontal lobe of the cerebrum immediately in front of a large fissure which constitutes the back boundary of the frontal lobe of the cerebrum (R. 34). There was no haemorrhage whatever in this portion of the brain, according to respondent's medical evidence (R. 36). Moreover, there would have to be considerable cortical damage there to produce hemiplegia (R. 33, 36). Respondent's Dr. Connor found no evidence whatever of damage to the cortex of the cerebrum adjacent to these motor areas (R. 36).

This uncontradicted evidence of respondent leaves the internal capsule as the only place where the lesion could have occurred in order to produce the result found here. Thus Dr. Siebert's failure to make a microscopic section of internal capsular tissue becomes highly significant. All the other medical evidence, including respondent's witness, Dr. Connor, shows that a lesion in the capsule the size of a small pea will cause motor-paralysis of half of the body. The fact that the minute scattered haemorrhage found by Dr. Connor was in the back portion of the brain, which everybody concedes does not contain the motor control areas, would point unerringly to the internal capsule or cortical motor areas as the place or places damaged. Therefore, given a case of right hemiplegia, with no abnormality found in that portion of the cortex which controls the movements of the right side of the body, and given further a slight haemorrhage in a portion of the brain which performs an entirely different function, and given the further fact that all of these cortical nerves which eventually reach the spinal column pass through the internal capsule, it is perfectly evident that a critical examination of the internal capsule was not only indicated, but demanded. This examination Dr. Siebert at no time made, obviously because he was afraid he would find a lesion there, which would negative electric death. The absence of a microscopic slide

containing internal capsular tissue is the most highly significant fact in all of this medical testimony. There is, and can be, no reason whatever for the failure of Dr. Siebert to include this tissue in his slides, except that he did not dare do so.

It is interesting to note Dr. Siebert's efforts to avoid a categorical answer to the question whether or not he had such a slide. He first said he made a section "of matter contained within the limits of the internal capsule" (R. 61). He was then asked which of the numbered sections contained that matter. He then said he would "rather explain it this way" (R. 61). Upon insistence that he point out the particular slide, he said, "Without looking at the microscope, this section contains **fibers** which pass through the internal capsule" (R. 61). (Note the effort to deceive.) He said that section contained "fibers" which **"pass through"** the internal capsule. But all fibers which pass from the brain to the spinal cord must "pass through" the internal capsule (R. 63, 64). Again a categorical answer was demanded, then he said, "This section contains internal **capsule** tissue" (R. 61). When asked if he meant by that answer "some of the **nerves** that go **through** the internal capsule," his answer was affirmative (R. 61). For three more pages of the record (62, 63, 64) this witness continued to evade in the same manner; finally, near the bottom of page 64, he admitted that "no section was made directly through the internal capsule."

This testimony is the principal reliance of respondent upon which to make a case. That it is intentionally misleading, evasive and self-contradictory we have demonstrated. An examination of Dr. Siebert's testimony (R. 47-85) will disclose to this Court that he seldom answered a question, but constantly made voluntary speeches, anticipated the weaknesses in his evidence and tried to strengthen his testimony in every possible manner.

We earnestly and sincerely insist that a verdict based upon such testimony is so shockingly a mockery of justice that this Court cannot give it approval.

(c) Respondent fares no better when we consider the uncontradicted physical facts immediately connected with the occurrence alleged to have produced the electric shock. These facts show conclusively that Benner could not have received an electric shock of any consequence. We enumerate them: (1) The protective fuses were not blown; (2) the lightning arrester bore no evidence of the passage of a heavy charge through it [the "burn" on the carbons was described by respondent's electrical expert as "incipient," and was so small he could not even see it with the naked eye (R. 235), and had to use a magnifying glass to discover it (R. 238)]; (3) no damage was done to the telephone instrument, physically or functionally; (4) and finally, Jenkins, to whom Benner was talking, felt no shock at all.

It is a matter of common knowledge that fuses used to protect telephones and lighting circuits are so constructed that a very small charge of electricity will "blow" them and break the connection.

The lightning arrester carbons were so slightly burned that respondent's electrical expert could discover the burns only by using a magnifying glass.

The undisputed evidence is that experimentation shows that when a standard telephone receiver is set upon a metal plate (a much better conductor than the human hand), it requires thirty-five to forty thousand volts to jump from the receiver to the metal plate (R. 171). How is it physically possible, then, for a current of electricity to have passed through with sufficient power to deliver a fatal shock to a user and at the same time neither "blow" a fuse nor "burn" the carbons in the lightning arrester?

If it requires such voltage to force a path through a telephone receiver to a good conductor, common knowledge informs us that both the fuses and the arrester would be completely demolished before the current could reach anyone through the receiver or the ringing device on the telephone.

Had a heavy charge of electricity passed through the telephone instrument, its subsequent operation would have been noisy because the line would have been grounded, according to the evidence on both sides (R. 162, 243, 244). But the line was not noisy (R. 162).

Finally, the uncontradicted evidence shows that yardmaster Ross Jenkins was talking to Benner at the very moment it is claimed Benner received his alleged shock. There was, of course, necessarily a direct physical connection between the two telephones—the wire. It is beyond reason to say Benner received a fatal electric shock, whereas Jenkins, on the other end of the line, not only was not injured, but felt no shock at all.

The Supreme Court of Missouri, in Kuhlman v. Water, Light & Transit Co., 307 Mo. 607, 271 S. W. 788, 798, said:

> "The evidence shows without dispute or question that if defendant had sent into the hotel such a current of electricity as it is claimed it did, it would have burned out the fuses in the transformer, destroyed the meter, burned out all the fuses in the fixtures, and destroyed the lights. None of these things occurred, however. * * * It is thoroughly demonstrated that defendant did not knowingly send into the hotel a current of dangerous voltage. Indeed, we are of the opinion that plaintiff could not have received the shock he claims to have had without some evidence thereof being found in the other fixtures or light of the hotel. And, as we have said, none of them were disturbed. The meter remained intact, and the transformer continued to perform its functions. None of the lights in the

hotel were in any manner affected, and none were extinguished save the one in the bathroom, which fell to the floor. The testimony shows that it was a physical impossibility for these things to exist if such a current as plaintiff claims passed through him."

The same conclusion was reached by the Supreme Court of Iowa, in Harter v. Colfax Electric Light & Power Co., 124 Iowa 500, 100 N. W. 508; and by the Supreme Court of Maryland, in Chesapeake & Potomac Telephone Co. v. Noblette, 199 A. 832, saying:

"The testimony is that there was not the slightest damage to the telephone line, nor was a single telephone service on the party line affected by electricity on the wires.

* * * * * * *

"The telephone in the mill was on a party line on which there were nine or eleven subscribers. If any one of these services were interrupted by the lightning destroying the mechanism of its telephone by fire, the service of all would be interrupted until the necessary changes and repairs were made. * * * The physical fact that the telephone service on the same party line as the mill was used after the fire started is conclusive evidence that the telephone at the mill had not been set afire by the lightning."

III.

If we assume, for argument only, that res ipsa loquitur is applicable to this case, does this Court's rule governing the direction of verdicts in all other tort actions apply?

Although this Court has not as yet passed directly on the question, the Circuit Courts of Appeals for the Seventh and Eighth Circuits have held that it does. Gray v. M. & O. R. Co. (7), 24 F. (2d), l. c. 673, 674; May Department Stores v. Bell (8), 61 F. (2d) 830, and cases cited.

(b), (1), (2). However this Court has ruled upon two

exactly analogous situations, viz., the inferences created by certain state statutes upon the happening of a casualty, and the inference against suicide.

Some of the states have passed statutes providing that if one is injured by the operation of a railroad train and so proves by his evidence, he makes a prima facie case of negligence against the railroad company. In other words, in that situation the jury is warranted in drawing an inference of negligence against defendant.

It will not be questioned that the res ipsa loquitur doctrine does no more than create an inference of negligence defendant. Sweeney v. Erving, 228 U. S. 233, 238, 33 S. Ct. 416, 418, 57 L. ed. 815, 819.

It can scarcely be denied that the inference created by res ipsa loquitur is of no more substance than that which is created by the character of statute now being discussed. Indeed, it seems clear that the statutory inference would be the stronger of the two, as it is declaratory of the policy of the particular state by its law-making body.

This Court has held that statutes of this character are unconstitutional unless they are so written that the prima facie case created by the inference inherent therein may be overthrown by defendant's evidence. This Court has gone further and held that the moment evidence antagonistic to such statutory inference comes into the case the inference is completely destroyed and the case must proceed as though the inference had never existed.

Western Atlantic R. Co. v. Henderson, 279 U. S. 639, 49 S. Ct. 445, 73 L. ed. 884;
Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 L. ed. 78.

The Supreme Courts of Georgia and Arkansas, in Snead v. State, 165 Ga. 44, 53, 139 S. E. 812, and Heard v. Arkansas Power & Light Co., 147 S. W. (2d), l. c. 364, respec-

tively, have drawn the exact analogy we draw here. The Snead case involved a statute providing that every insolvency of a bank should be deemed fraudulent, and the president and directors should be punished by imprisonment in the penitentiary. There was a proviso, however, that one prosecuted under that statute might repel the presumption of fraud by producing certain evidence. In passing on that statute the Georgia Court said, 165 Ga. 44, 53, 139 S. E. 812, that the statute itself was "but an application to a criminal case of the doctrine of res ipsa loquitur, often applied in civil proceedings."

The Arkansas Court was discussing the res ipsa loquitur doctrine and the inference by it created. After announcing the rule that the inference arising by virtue of res ipsa loquitur is completely overcome by defendant's countervailing evidence, the court said, at 147 S. W. (2d), l. c. 364:

> "In this respect it is comparable to and not distinguishable from the rule of law on our statutory presumption of negligence where a person or property is killed or injured by the operation of a train. In such a case a presumption of negligence arises from the mere happening of the incident, but it is a mere rebuttable presumption which is overcome, disappears and has no further place in the case when the railroad company offers proof of its due care."

(b) Likewise the inference or presumption against suicide is permitted to be effective only in the absence of attacking evidence. This inference of love of life is obviously at least as strong as the inference of negligence created by res ipsa loquitur. Nevertheless this Court has held that the introduction of evidence contradicting the inference against suicide takes such inference entirely out of the case.

> New York Life Ins. Co. v. Gamer, 303 U. S. 161, 171, 58 S. Ct. 500, 82 L. ed. 726.

IV.

Even though we concede that both the medical and the factual evidence is sufficient to establish Benner's death resulted from an electric shock, where is the evidence of petitioner's negligence?

Benner himself said that he did **not** receive a shock through the telephone. When asked the direct question: "Where did you get the shock, Bill; when you went to ring or take the receiver down, or where?" His answer was: "Fire—fire come down the pole" (R. 135). Benner told Dr. Canady that "he had been talking over a telephone about 6:30 and that the wires had been struck by lightning" (R. 108). The very first remark Benner made to anyone after he had talked over the telephone was: "Did you see the lightning strike the pole?" (R. 15).

The evidence is undisputed that this telephone equipment was guarded against lightning and man-made electricity of high voltage by standard equipment (R. 150, 160, 168, 232). There is no testimony that either the lightning arrester or the fuses was or were substandard or dangerous. There was some evidence that there is on the market now an arrester which two of respondent's electrical witnesses thought was better than the one used by petitioner. But no duty rests upon an employer to use the newest appliance so long as the one in use is reasonably safe and suitable, as these were shown to be.

This Court said in Southern Pacific Co. v. Seley, 152 U. S. 145, 153, 38 L. ed. 391, 395, quoting from Washington & G. R. Co. v. McDade, 135 U. S. 570, 34 L. ed. 241:

> "Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employees. Nor are they bound

to supply the best and safest or newest of these appliances for the purpose of securing the safety of those who are thus employed."

In the later case of C. & N. W. R. Co. v. Bower, 241 U. S. 470, 473-474, 60 L. ed. 1107, 1109, this Court reaffirmed the principle thus:

> "The rule of law is: That the employer is under a duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employee, but is not required to furnish the latest, best, and safest appliances, or to discard standard appliances upon the discovery of later improvements, provided those in use are reasonably safe and suitable." (Citing Cases.)

For each and all of the above reasons, petitioner urges this Court to issue its writ of certiorari herein.

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(13)

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OCTOBER TERM, 1941.

No. 897.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Petitioner,

vs.

ALICE BENNER, Administratrix of the Estate of William H. Benner, Deceased,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 897.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Petitioner,

vs.

ALICE BENNER, Administratrix of the Estate of William H. Benner, Deceased,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The statement of this case which is made in petitioner's petition for a writ of certiorari, and brief in support thereof, is extremely partisan and highly misleading. It consists, in the main, of "hand-picked" portions of the evidence—in many instances only a portion of a sentence of the testimony of a witness—deemed by petitioner to be

favorable to its contentions, and which are asserted by petitioner to be the uncontradicted and undisputed evidence, but which, when the evidence is viewed as a whole, are either directly contradicted or so distorted as to be made to appear favorable to petitioner when, in fact, they are not. We know of no way to correct this condition, except by making a rather lengthy statement of our own. We realize that such a statement by us may be wholly unnecessary, but we believe that it may serve the convenience of the Court, and, therefore, we respectfully ask the indulgence of this Honorable Court in our making a rather detailed statement.

The Proceedings Below.

This action was brought by the respondent Alice Benner, administratrix of the estate of William H. Benner, deceased, plaintiff in the trial court, against the petitioner Terminal Railroad Association of St. Louis, defendant in the trial court, under the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, 35 Stat. 65, as amended; 45 U. S. C. A., §§ 51-60, as amended), to recover damages for the death of her intestate, who was also her husband, which occurred on May 5, 1940, allegedly as the result of an electric shock sustained by him on April 30, 1940, while he was using, in the course and scope of his employment by petitioner railway and while engaged in interstate commerce, a telephone under the exclusive control of petitioner. The action was and is, concededly, controlled by the Federal Employers' Liability Act (R. 9).

The case was pleaded (R. 2-5), and submitted to the jury by the instructions of the trial court (R. 247-252), under the doctrine of res ipsa loquitur. The jury returned a verdict in favor of the plaintiff below, respondent here, in the sum of $25,000.00 (R. 254-255), and from the judgment entered upon that verdict the defendant railway, peti-

tioner here, duly appealed to the Supreme Court of Missouri, which affirmed the judgment of the trial court (R. 265).

Opinion of the Court Below.

There was no opinion rendered in the trial court.

The opinion of the Supreme Court of Missouri, here sought to be reviewed, appears at pages 265 to 276 of the printed record herein, and is reported as Benner v. Terminal R. R. Assn. of St. Louis, 156 S. W. 2d 657, but is not yet officially reported.

The Evidence.

Many of the facts in evidence were, and are, without dispute. For convenience here, we shall recite first the undisputed facts, followed by petitioner's evidence which is in dispute, then by the respondent's evidence in rebuttal, and then follow with a recital of the medical evidence of both parties.

Undisputed Facts.

On April 30, 1940, the respondent's intestate Wm. H. Benner was the conductor on one of petitioner's freight trains moving from near Dupo, Illinois, to East St. Louis, Illinois, and engaged in interstate transportation and commerce (R. 9). About 6:20 o'clock p. m. (R. 3-14) the train reached a point near Dupo where it became necessary for him, in the line of his duty (R. 19), to use one of petitioner's telephones to get orders regarding the further movements of his train and the track upon which it was to move (R. 9).

This telephone, which was concededly maintained and controlled exclusively by the petitioner railway (R. 20), was located in a box on the south side of a telephone pole which stood adjacent to, and on the north side of, petitioner's track there (R. 13), and both the box and the tele-

phone instruments there are clearly, and concededly (R. 10), shown in Plaintiff's Exhibits D and E, appearing opposite page 244 of the record herein. An examination of Plaintiff's Exhibit E will show that the equipment in the box consisted of a generator type telephone instrument (including receiver, mouthpiece and signal bells) mounted at the lower part of the box, with two lightning arresters mounted above it in the upper part of the box. A person using the telephone would be facing to the north and the telephone receiver would be on his left, or west, side (R. 10).

As the train, which was moving westwardly at that point (R. 10), approached this pole it was brought to a stop with the front of the engine just south of the pole (R. 14), which would place the cab on the engine about forty feet east of the pole (R. 13). It was raining and storming, with thunder and lightning, at the time (R. 12), and Benner, with his raincoat and hat on (R. 12), got off the north side of the engine to go to the telephone to make his call to receive instructions from the petitioner's yardmaster at East St. Louis (R. 9, 11, 12, 13). The engineer of the train, a Mr. O'Blennis, whose position of work was on the right-hand, or north, side of the cab of the engine (R. 10), watched Benner go to the telephone (R. 11, 17), and then, in order to have a conversation with the fireman and head brakeman, who were located in the cab of the engine, looked away from Benner and toward the other men (R. 11, 16, 17). At the trial O'Blennis testified that, before he turned to talk to the fireman and head brakeman, he did not see Benner ring the telephone (R. 18-19), although he knew that Benner had gone to the box and gotten into it for that purpose (R. 19). But in his deposition, taken prior to the trial, O'Blennis testified that he saw Benner go from the engine to the box, lift the lid of the telephone box and ring the telephone (R. 15-16). In any event, after

talking with the men in the cab for a few moments—what he thought was sufficient time for Benner to have completed his call—O'Blennis turned to look at Benner (R. 11, 13, 17), and he then saw Benner turning toward the east, with his left hand up by his head (R. 11, 13, 17), and "dropping the telephone [receiver] from his left ear" (R. 11, 13), and the receiver dropped from his left hand, and by his left side, to the end of its cord (R. 13). O'Blennis did not know whether Benner had talked over the telephone with the yardmaster, one Ross Jenkins, before that time, but Benner had had time to do so (R. 13). As Benner dropped the receiver his arms fell to his sides and he stood there stiffened in a manner demonstrated by the witness O'Blennis at the trial (R. 11-12, 17, 18), and trembling (R. 16), and with his eyes bulging abnormally and with his mouth working "as if he wanted to say something" (R. 12, 13, 16), for a period of time estimated by O'Blennis as three minutes (R. 11, 12, 16). O'Blennis could not tell whether Benner was saying anything at that time, because O'Blennis was too far away from him, and could not have heard him under normal conditions because of the noise of the engine (R. 13). Then Benner reached down, picked up the receiver, put it to his ear, raised the lid of the telephone box which had fallen, went back into the telephone box and completed his call to the yardmaster (R. 11, 12, 14). After completing his call Benner hung up the receiver, closed the telephone box, gave the engineer a "proceed" signal and, as the cab of the engine passed him, he got onto the engine (R. 11, 16). Upon getting into the engine cab Benner asked O'Blennis if the latter had seen lightning strike the pole—Benner did not say that it had done so (R. 15)—and, upon receiving a negative answer from O'Blennis, Benner said, "I got a shock there" (R. 12, 18).

Fully corroborating the foregoing was the testimony of petitioner's yardmaster, Ross Jenkins, who was on duty

in the petitioner's yardmaster's office at East St. Louis on this occasion. He testified that he talked with Benner over the telephone on this occasion (R. 124); that Benner called up, said "Hello, Ross," and there was then a clicking noise in the telephone (R. 124), and a break in the conversation (R. 127) when Benner "turned loose the telephone" (R. 124); that this clicking noise was such as he (Jenkins) had never heard before, although he used the telephone almost constantly in all kinds of weather (R. 126); that after an interval of time had elapsed (R. 126)—a sufficient interval for Jenkins to characterize his next conversation with Benner as being his second "talk" with Benner (R. 126, 127)—Benner, speaking over the telephone again, asked Jenkins if he "felt that shock" or "that jar," and upon receiving an affirmative answer from Jenkins (R. 125) Benner said, "I got a shock; it is down to the end of my fingers" (R. 126, 128); that Jenkins then asked Benner if he was hurt and Benner replied, "No, don't amount to nothing; just a little sting" (R. 126, 128); and that Jenkins then gave Benner his instructions, including orders to pick up three cars that had been left on the southbound track by another conductor, Mr. Kroeck (R. 132), and their conversation ended (R. 126). Later that same evening, at about 7:30 (R. 132), and when Benner had gotten to the yardmaster's office in East St. Louis, he complained to the yardmaster that he was "still having a tingling sensation in his hand," and again told Jenkins that "that phone shocked him" (R. 131), and Jenkins' testimony in this connection being further as follows (R. 131-132):

> "Q. And he said he got it on the telephone, didn't he? A. He said he got a shock; yes, sir.
> Q. On the telephone? A. Yes."

Following the time he received the shock, respondent's intestate, Benner, continued to work with his crew and continued to complain of "tingling" and "numbness" of

his arms. About forty-five minutes after he had done this telephoning he complained to one of his switchmen, Nicholson, that he (Benner) had "'gotten a shock down there at the telephone' when he called up" (R. 133, 134, 136); that his (Benner's) hand felt "kind of numb, like it is going to sleep" (R. 133, 134), and that his hands were tingling (R. 136). A little later Benner told another member of his crew, one Shaw, that he (Benner) "had received a shock on the telephone" (R. 133).

When the crew went to supper near Dupo, some three hours after Benner had received this shock, various of petitioner's employees observed that Benner, in trying to make out a time slip in the "shanty," was nervous and fumbling, with sweat "popping out on his forehead," and "breathing kind of hard" (R. 138), and in a sufficient state of collapse that he was sent to a nearby doctor, Dr. Canady (R. 138), in the automobile of one of petitioner's employees (R. 147). Upon inquiry by the latter, on the way to the doctor's office, as to what had happened to him, Benner, who by that time had considerable trouble in speaking and was "weaving his arms," again said that he had received a shock while telephoning (R. 148). At Dr. Canady's office Benner told the doctor that he was "talking over a telephone * * * and the wires had been struck by lightning" and he had gotten a shock (R. 107-108).

Dr. Canady observed that Benner was partly paralyzed and suggested that he be taken to a hospital (R. 104), and Benner was then taken to petitioner's yard at Dupo by the employee who had taken him to Dr. Canady's office, and from there by ambulance to the Missouri Pacific Hospital in St. Louis (R. 138, 148-149). By the time he reached the hospital Benner had a complete paralysis of his right side, and was unable to speak (R. 21); he was unconscious, but could be aroused by severe stimulation to such a state of consciousness as to carry out some of the simpler orders

given him, but he could not speak, and, if left alone, would sink quietly back into unconsciousness (R. 87, 97-98, 100); and these conditions steadily got worse until he died on May 5, 1940 (R. 21, 88, 98).

The evidence is further undisputed that, shortly prior to the occasion of Benner receiving the shock from the telephone here in question, another of petitioner's crews, in charge of conductor Carl Kroeck, had done some work in the vicinity of this telephone, and Kroeck had occasion to use that telephone at about 6:10 p. m. to get some orders or instructions (R. 21-22, 109-110, 115-118, 124-125), after leaving three cars to be picked up by Benner's crew (R. 115, 124), and which cars, in the telephone conversation which he later had with Jenkins at the time he received his shock, Benner was ordered to pick up and put in his train (R. 132). When Kroeck used this phone on that occasion, he took off his rubber gloves, took hold of the telephone generator crank handle, and received a shock of such severity as to cause his hand to shake violently and be followed shortly by a numbness of his hand and arm, which persisted in his arm for three weeks and at the ends of his fingers for twenty-seven days (R. 113, 114, 118, 122). After receiving this shock, Kroeck put his rubber gloves back on and completed his call without further incident (R. 123, 124), but later that night, when he "turned in" he reported to yardmaster Jenkins that he had received the shock (R. 114, 119), and he later gave a signed statement to petitioner's claim agent, Mr. Johnson, about it (Abs. 117-118). At the time Kroeck received this shock the storm had abated somewhat, but it was raining, with thunder and lightning in the near distance and not a long way off (Abs. 118).

The evidence is further undisputed to the effect that petitioner's conductor, Carl Kroeck, received another shock from this telephone on October 7 or 9, 1940, some five months after the occasion of the injury to respondent's husband and intestate (R. 113, 222), and when the tele-

phone was in the same condition as it previously had been when Kroeck and Benner were shocked on April 30, 1940 (R. 150, 158-159). Kroeck, undisputably, reported to the yardmaster, and other officials of the petitioner, that he had received this later shock also (R. 163, 222). When Kroeck received this later shock he received the shock in his left hand, it coming through the telephone receiver (R. 223-224), and on that occasion there was no storm or thunderstorm—it was "a clear night, stars all shining" (R. 224).

The foregoing recital of the undisputed facts contains a summary of plaintiff's evidence in chief respecting the facts immediately surrounding the occurrence which is the basis for this action.

Defendant's Evidence.

The defendant-petitioner's evidence tended to establish that the telephone in question was operated with a normal, harmless electrical charge of not to exceed forty-five volts (R. 162), and was equipped with "lightning arresters" (R. 150), to prevent any injury to the telephone mechanism or the telephone user in case of a heavy discharge of electricity, lightning or heavy voltage along the telephone line (R. 152, 160, 161-162); that these lightning arresters on the telephone in question were "standard" arresters (R. 150, 151, 168), manufactured by the Western Electric Company (R. 150, 160, 168), of the "latest model" (R. 151), of the "best" type (R. 160), although of a "common" type in use for at least twenty years (R. 160, 162); that, although there were several similar types of lightning arresters of about equal effectiveness (R. 160), there was no other instrumentality or method in general use, or known to either the trade or science, which would afford as much or better protection (R. 152, 157, 160, 169); that these devices consisted, essentially, of two fuses, one connected in each of

the line wires, beyond which the wires led to the "arrester"—a porcelain and carbon block "air gap," the center carbon blocks of which are connected to a ground wire and the outer porcelain and carbon blocks connected to the line wires—and then on to the telephone instrument proper (R. 151-152); that electric charges in the line, in order to get to the telephone instrument, must first pass through the fuses and then through the arrester (R. 152-153, 159-160); and that any unusual charge of electricity in the line "generally" or "probably" blows out the fuses—in which event the telephone instrument is disconnected from the line—but, in the event the fuses do not blow out, and the excessive charge reaches the arrester, such charge will take the line of least resistance, and "generally" jumps across the air gap and is dissipated through it and the ground wire into the ground (R. 152-153, 159-160, 166-167). One of the lightning arresters from the telephone here involved was removed a few days before the trial below, and exhibited at the trial as Defendant's Exhibit 2 (R. 151, 153, 156, 158, 164).

Petitioner's evidence further tended to establish that, with its telephone system equipped as it was, it was impossible for a person using this telephone in the usual manner to receive a shock from the telephone instrument or its receiver or generator crank handle, at any time or in any weather, if the system is functioning properly (R. 154-156, 164-165); and that, if a person does receive such a shock, "something is wrong" (R. 165).

The petitioner's evidence tended to show that this telephone was inspected about once a month (R. 150); that, prior to April 30, 1940, it was last inspected about two weeks before that date (R. 150); that, following the shocks received by respondent's decedent and Mr. Kroeck on April 30, 1940, it was again thoroughly inspected by petitioner's employees on May 2, 1940 (R. 156); that, following the

shock received by Mr. Kroeck in early October, 1940, it was again inspected by petitioner's employees on October 9th (R. 157, 158, 163); and that it was again inspected by Mr. Glasgow, petitioner's expert witness, on October 16, 1940 (R. 167). The petitioner's evidence further tended to establish that, throughout the period of time covering these inspections, there was no change in the equipment or condition of its telephone system here involved (R. 150, 158-159); and that these inspections disclosed no evidence that the pole to which this telephone here involved was attached, or any of the telephone apparatus there, or anything in the immediate vicinity of it, had been struck by lightning (R. 166, 168, 170). Petitioner's witness and telephone maintainer, William Smith, who had made some of these inspections, testified that the carbons of the one lightning arrester produced at the trial, after being removed from this telephone, showed no evidence of smudges or burns which would indicate that an excessive charge of electricity had passed through it (R. 153-154, 156); but petitioner's chief operator in charge of its telephones, Mr. Wunder, and its expert witness, Mr. Glasgow, testified that these carbons showed burns and smudges indicating that an excessive charge of electricity had struck the line wire, passed through the telephone system, and jumped the "air-gap" in the arrester (R. 159, 161, 162, 163, 168-169)—which excessive charges, if lightning be used as a measuring stick, were not heavy and were "very light" (R. 159, 162, 169). Petitioner's evidence was further to the effect that it would take an electrical charge of at least 35,000 to 40,000 volts for a person to receive a shock through the telephone receiver (R. 171), and a charge of "quite a few thousand" volts for a person to receive a shock through the telephone generator crank handle (R. 171-172); that the passages of those voltages through those respective appliances would leave clear evidence of the fact of such passage (R. 172); and that the telephone, and its parts,

showed "no marks of any high voltage transit" (R. 158, 161).

Plaintiff's Evidence in Rebuttal.

In rebuttal of the foregoing evidence of defendant-petitioner, plaintiff-respondent offered the testimony of two experts, F. W. Peebles and Foster W. Gregg. The substance of their testimony was that the carbon and porcelain blocks in the lightning arrester exhibited at the trial as Defendant's Exhibit 2 are not the latest nor best devices in common use to serve the purpose intended by them (R. 226-227, 240); that, since 1924 or 1925, there have been on the market improved blocks which contain a fusible plug, and which permanently ground the line wires when an excessive charge passes through the air gap (R. 226-229, 240), and thereby afford much better protection (R. 228, 231-232, 243); that the improved blocks are interchangeable with the older type; and that the older type can be replaced by the improved ones at a cost of a "very few cents" (R. 228).

These witnesses further testified to the effect that, if a man was standing in the rain using the telephone, under the circumstances existing when Mr. Benner received his shock, his body would form a "perfect ground" to such an extent that an excessive electrical charge getting into the telephone system will pass through his body (R. 225, 240); and the witness Peebles testified that this condition could be obviated by providing a dry board or dry floor for such person to stand upon (R. 225-226).

The witness Peebles further testified that electricity will follow all paths presented to the ground, with the greater bulk of it taking the path of least resistance (R. 234); that the seven ampere fuses in the lightning arrester exhibited at the trial would not protect a person against a death-dealing current, which is a current of between eight one-hundredths (.08) amperes and two-tenths

(.2) amperes (R. 233); that it would take a voltage of about 400 volts in order for an electrical charge to jump the air gap in the lightning arrester exhibited by defendant at the trial, and a voltage of between 250 and 400 volts in order for that to happen on the improved type, dependent upon how it was adjusted (R. 234). Upon first examining the carbon blocks from the lightning arrester produced at the trial, the witness Peebles said that he saw no evidence of burns upon them, but he could not say that they showed no evidence of the passage of electrical charges, because he did not know how much they had been handled, and he had handled them at the trial enough to destroy some of the evidence, because the smudges would wipe off the blocks (R. 235), but, after examining the blocks under a hand magnifying glass he found "incipient burns" upon them (R. 238).

The Medical Evidence.

The medical evidence offered by plaintiff-respondent in her case in chief consisted of the testimony of a coroner's physician, Dr. John J. Connor, who performed an autopsy upon the body of the deceased on the date of his death, May 5, 1940, for the Coroner (Abs. 23-24), and the testimony of Dr. Walter J. Siebert, a pathologist, who performed another autopsy the day following, at plaintiff's request (Abs. 48).

Plaintiff-respondent's witness, Dr. Connor, testified that his autopsy consisted of a gross examination (i. e., macroscopic examination by the naked eye, as distinguished from microscopic examination), as the Coroner's office was not equipped to do microscopic examination (R. 29); that he found no evidence of abnormality except in the brain (R. 27-28), and that the abnormality of the brain consisted of diffused subarachnoid hemorrhages of the brain in the occipital region or posterior half of the brain (R. 30), edema of, or an abnormal increase in the fluid in,

the brain (R. 24, 28), and visible evidence of pressure of the calvarium, or bone of the skull, on the surface of the brain (R. 44). He further testified that these hemorrhages of the brain were diffused and minute, in the area of the arachnoid, which is the middle of three membranes covering the brain (R. 25); that there was no heavy hemorrhage such as usually accompany skull fractures, and "no large hemorrhage in the ventricles of the brain that you usually get with apoplexy" (R. 25); that the pressure exerted by these subarachnoid hemorrhages, together with the edema of the brain, would cause a paralysis of the right side of the body such as Mr. Benner had (R. 26, 45); that the subarachnoid hemorrhages could result from electric shock suffered by a person using a telephone (R. 26-27), and that, in his opinion, deceased's death was caused by subarachnoid hemorrhage of the brain (R. 24). On cross-examination Dr. Connor testified that his examination of the brain was made by removing the brain from the skull, opening the ventricles by making incisions on the sides of the brain, turning the brain over and cutting it off between the cerebellum and cerebrum, removing the medulla, making a longitudinal incision in the medulla, a cross incision in the cerebellum, and cross incisions through the cerebrum from front to back at intervals of about two inches (R. 29); that he examined the internal capsule, which is the portion of the brain through which the nerve pathways from the cortex pass and converge toward their connection with the spinal cord, but could not tell anything about it grossly (R. 31); that an injury to the brain in the internal capsule the size of a pea could cause complete paralysis on one side of the body, known as "hemiplegia" (R. 31-32, 33), but quite a bit of pressure on the brain could also produce such paralysis, without there being any injury to the internal capsule—he had seen a subdural hemorrhage do the same thing—and the damage from the pressure did not have to be in the fore-

part of the cerebrum (R. 33); that a paralysis of one side of the body occurred in certain cases of shock, and in some cases of brain concussion, and could result from diffused minute hemorrhages and resulting edema, such as in this case (R. 36-37, 41-42), and that the character of hemorrhage suffered by Mr. Benner will cause hemiplegia (R. 42-43). He further testified that not all cases of death by electric shock result in subarachnoid hemorrhages; that the presence of subarachnoid hemorrhages is not indicative of electric shock; that he did not mean to say that it was his opinion that Mr. Benner died from an electric shock; that in order to express his opinion on that matter he would want the benefit of a microscopic examination, and that medical literature was to the effect that, by microscopic examinations and special staining, it could be demonstrated whether a person died of electric shock and whether the electric current causing the shock was direct or alternating current (R. 46-47).

Plaintiff-respondent's witness, Dr. Siebert, testified that at the autopsy made by him he examined not only the deceased's brain (R. 48), but also deceased's heart, lungs, kidneys, spleen and liver, which are ordinarily considered vital organs (R. 49); that there were no chronic diseases anywhere in the body which could have caused the death (R. 48), and there was nothing the matter with any of the organs, other than the brain, which could in any way enter into the cause of death (R. 49).

He further testified that he made a thorough examination of the deceased's brain, slicing it at intervals of about one-fourth inch (R. 73-74), and making microscopic sections of those areas most likely to show microscopical change (R. 49, 58-59, 76-77); that the brain showed "marked pathological changes" (R. 48); it showed the subarachnoid hemorrhages; it showed no hemorrhage along the internal capsule and no large hemorrhage anywhere in the brain, and it showed many tiny so-called

"petechial hemorrhages" in various portions of the brain and throughout the brain (R. 48, 52, 65); that there was "very marked" edema of the brain (R. 52, 65); that there was what is known as a "pressure collar" on the cerebellum or lower part of the brain, being a collar formed by brain tissue that has been forced, by the pressure following increased brain volume from an increased amount of brain fluid or edema, into the space around the spinal cord at the bottom of the skull (R. 52, 56, 57-58); that there was dilation of the perivascular spaces in the brain and marked dilation of the small blood vessels (R. 65); that there were peculiar oval-shaped and rounded areas of softening or rarefication of the brain of recent origin, most frequently seen around blood vessels, but sometimes independent of the blood vessels—a condition described by one Yaffe, an authority upon the subject, as being peculiar to electrical injuries to the brain (R. 52); and that there was degeneration of nerve cells, and various nerve cell changes—swelling of nerve cells, loss of Nissl substance, displacement and disruption of the nuclei of nerve cells, breaking up of the substance of the nuclei of nerve cells, extrusion of nucleus from the nuclei of nerve cells, and shrinking of some nerve cells which the cell and the nucleus became homogeneous so that the nucleus could no longer be differentiated from the cytoplasm of the cells—which changes were most marked in the sections made from the basal ganglia and the pons (R. 52-53).

Dr. Siebert further testified that many of these changes were of a type not necessarily due to electrical injury (R. 53); that the condition described by Yaffe, and found by him in decedent's brain, was peculiar to electrical injuries to the brain (R. 52); that there was no body reaction, or inflammatory changes, about the degenerative areas of the brain, which is typical when electric currents pass through the brain (R. 68-69); that an electric shock does not necessarily leave pathological evidence, and many

deaths by electrocution leave no changes whatever in the body, but, when changes are present in a peculiar combination, they indicate very strongly that electrical injury to the brain has occurred (R. 51). He then testified as follows:

> "Q. Now, may I ask you, in this case did you find present a peculiar combination of such changes in the brain? A. I did" (R. 52),

and, after describing that peculiar combination of changes (R. 52), he testified as follows:

> "Q. Doctor, * * * aside from the use of all this terminology, I want to ask you again, do all these things that you have suggested here, do they typify a case of electric shock where death is caused by that? A. Yes, they do, very definitely" (R. 53).

He also testified as follows:

> "The conclusion that I drew from the study of these microscopic sections indicated that this man died of an electric shock, and that there were no chronic diseases which could have caused the death" (R. 49).

Dr. Siebert further testified that his conclusion that Mr. Benner died of an electric shock would be in accord with the fact that the onset of Mr. Benner's paralysis was delayed for a few hours after he received the shock, because the symptoms of electric shock to the brain may be either immediate or delayed (R. 53-54), and that, while the pathological cause of such delayed symptoms is not definitely known, pathological rules indicate that the escape of fluid in edema may be progressively greater, or cumulative in its effect; that the nerve cell injury may be progressive so that the injured cells do not lose their function for some time after the shock, and that the anemia resulting in degeneration of the brain tissue, which follows blood vessel spasms which occur in electrical injuries, may not be evidenced for several hours, depending upon the degree of the spasm of the vessels (R. 54).

On cross-examination, Dr. Siebert testified that he did not make a microscopic section directly through the internal capsule of deceased's brain, or to show the internal capsule directly (R. 64-65, 77); that he examined the internal capsule grossly, and saw nothing in the internal capsule that made him want to make a microscopic section directly through it, as the internal capsule was normal, and any involvement of the internal capsule sufficient to be of any consequence so as to justify or necessitate a microscopic examination of it would be evidenced first to the naked eye (R. 77-78, 84); that he made his microscopic sections from those areas of the brain which his gross examination led him to believe advisable and most likely to show microscopical change (R. 49, 76-78, 84); and that he used a standard stain, which would show any pathological change in the brain, in making his microscopic sections (R. 79-80). He further testified that, in his opinion, the changes in Mr. Benner's brain could be from lightning, but not from a direct blow or bolt of lightning, because a man struck directly by lightning would probably have an immediate death, fracture of the skull, laceration of the brain, and severe body burns and, in any event, considerable more damage to his brain than Mr. Benner had, and probably other injuries (R. 80-82).

Defendant-petitioner's witness, Dr. Unterberg, a neurologist, testified that he saw Benner first on the 1st day of May, 1940—the day following the shock received by Benner—at the Missouri Pacific Hospital (R. 87), and he described Benner's condition as hereinabove referred to (ante, pp. 7-8; R. 87-88), characterizing the complete paralysis of Benner's right side as a "right hemiplegia" (R. 88); that he then made a written diagnosis of Benner's case as "left cerebellar capsular lesion, probably hemorrhage, with a right hemiplegia" (R. 88)—which diagnosis he admitted to be both erroneous and the statement of a medical impossibility (R. 94-96); that "a number of

things" could have been the cause of Benner's condition, the most common being the ordinary apoplectic stroke resulting from either a hemorrhage due to the breaking of a blood vessel or a blocking of a blood vessel by a thrombus or an embolus, but it also could be due to traumatism (R. 88-89); that, in his opinion, to get a result such as occurred in Mr. Benner's case, the hemorrhage, thrombus or embolus would have to be in the internal capsule of the left side of the brain (R. 89-91); and that, if it was a thrombus or embolus, it would have to be as large as a pea, which would produce a larger area of softening which might be of almost any size (R. 91). In answer to a hypothetical question which included Benner's physical symptoms but excluded the element of an electric shock sustained by Benner, he testified that, in his opinion, Benner suffered from a thrombus or embolus rather than from a hemorrhage (R. 92-93); and he further testified that he again saw Mr. Benner on May 5, 1940, at which time Benner's condition had become much worse (R. 88), and that he (Dr. Unterberg) made no gross or microscopic examination after Mr. Benner's death (R. 97).

Defendant-petitioner's witness, Dr. Lee B. Harrison, testified that he first saw Mr. Benner on May 1, 1940, after he had been seen by Dr. Unterberg, and this witness also described Mr. Benner's condition (R. 97-98). He further testified that he continued to have Mr. Benner under his care until the latter's death on May 5, 1940 (R. 102); that he diagnosed Mr. Benner's condition as "right hemiplegia, embolism of left internal capsule and hypertension, with associated chronic nephritis" (R. 98), which last condition was a chronic inflammatory or degenerative kidney condition, also known as Bright's disease (R. 98). On cross-examination he testified that he made no written diagnosis, but merely wrote Mr. Benner's symptoms on the hospital record (R. 98-102); and that the hospital record showed Mr. Benner to have had a "hemorrhage" and made no mention of any "embolism" (R. 103-104).

Defendant-petitioner's witness, Dr. O'Leary, who made a specialty of neuroanatomy and neurophysiology (R. 172-173), and consulted with neurologists concerning the anatomical position of lesions in the nervous system (R. 173), but who was not a clinician and did not practice medicine (R. 190), testified with respect to the details of the structure and functions of the brain, and with respect to his examination of the microscopic sections or "slides" made of Mr. Benner's brain by Dr. Siebert. He testified, in substance, that he examined eight of such sections (R. 173, 177); that the staining of these sections had been done by a "perfectly good method" (R. 180-181); that, aside from "hemorrhage of small degree around some of the blood vessels" (R. 182, 183, 185, 187), dilation of spaces about the blood vessels (R. 184-185), and edema of the brain (R. 184-185, 187), he saw in the sections "no changes which are not within the normal limits of variability" (R. 184); that, because he saw no glia reaction or reorganization (R. 182-183, 186), it was his opinion that these hemorrhages occurred not more than six to twelve hours before decedent's death (R. 183, 185); that he saw no evidence in the sections which would be indicative that hemorrhage of the brain either did occur, or did not occur, five days before the death (R. 185-186); and that various of the conditions which Dr. Siebert had testified as having been observed by him in the sections are, each and of themselves, no evidence one way or another on the question of whether the brain had been subjected to an electric shock (R. 187-189). He further testified that, in his opinion, a hemiplegia would "most likely" result from a disturbance in the internal capsule of the brain on the side opposite that of the paralysis (R. 189), and that such a primary disturbance would have to be as large as a pea, and around it would exist an area of softening (R. 190); and that he was not qualified to state the difference in symptoms which would result if the disturbance were a hemorrhage

rather than a thrombus, or an embolus rather than either a hemorrhage or a thrombus (R. 190).

Defendant-petitioner's witness, Dr. Irwin Levy, a neurologist (R. 195), who never saw the deceased nor the microscopic sections (R. 200), testified that, in apoplexy resulting from hemorrhage, there is usually sudden loss of consciousness followed by paralysis; in apoplexy resulting from embolus, there is usually sudden paralysis which may be followed by loss of consciousness; and in apoplexy resulting from thrombosis there is usually a gradual onset of paralysis in a part of the body and spreading rapidly to the entire side of the body (R. 196-197). In answer to a hypothetical question, which hypothesized the symptoms exhibited by Mr. Benner, but excluded the element of his sustaining an electric shock, this witness testified that, in his opinion, Mr. Benner suffered from a "cerebral thrombosis"—that is to say, a vascular lesion, or a shutting off of blood supply, due to either interference with the blood supply or a breaking of the blood vessel—"some involvement of the blood vessel of a pathological nature" (R. 197-200).

Defendant-petitioner's witness, Dr. Harris, a pathologist and bacteriologist (R. 200, 207), testified, in substance, that the length of time that a "pressure collar" existing on a brain removed from a skull would continue to exist would depend upon what manipulation was made of the brain (R. 201-202); that he "would not venture to say" whether a brain, handled as Mr. Benner's brain was handled at the autopsy made by Dr. Connor, would thereafter show any evidence of a pre-existing "pressure collar" (R. 202), and that, in his opinion, there would be no evidence of the pre-existing pressure collar, under those circumstances (R. 203). He further testified that he examined the microscopic sections made of Mr. Benner's brain by Dr. Siebert (R. 204); that they showed hemorrhages between the membranes covering the brain and the

brain itself (R. 204-205); that, because he saw no reorganization process, it was his opinion that those hemorrhages occurred within twenty-four hours prior to Mr. Benner's death (R. 205); that he was not qualified to distinguish microscopic sections of the internal capsule from those of other parts of the brain, and not qualified to tell, from the cells in a section of a post-mortuus brain, whether it is normal or not (R. 206), and that he saw in those microscopic sections nothing which would give him any indication as to the cause of Mr. Benner's death (R. 206).

Plaintiff-respondent's witness in rebuttal, Dr. Gradwohl, a pathologist with exceptional qualifications (R. 208), testified that hemorrhage in the occipital region of the brain can produce hemiplegia if there is enough intracranial pressure formed (R. 209); that, in his experience in post-mortem examinations of persons who had died of electric shock, the outstanding characteristic was petechial hemorrhages of the brain, accompanied by miscroscopic changes in nerve tissue (R. 209-211);* that the death, in such cases, is not referable to any particular part of the brain, but is due to a general disseminated effect on the entire cortical brain structure (R. 209); that there need be no hemorrhage in the internal capsule (R. 209), and he had never seen gross hemorrhage in a case of electrical death (R. 210).

He further testified that a hemorrhage in the internal capsule of a size sufficient to be of significance in determining the cause of death would reveal itself to the eye of a trained pathologist, because it tears down the structure of the brain and fills up various parts of the brain with blood (R. 210, 215); that a thrombosis in the internal capsule is grossly visible, and more easily located than the point of hemorrhage when a hemorrhage occurs in the

*These were the conditions which Dr. Siebert found in Benner's brain, ante, pp. 15-16.

internal capsule (R. 215-216), and that an embolus in the internal capsule may be difficult to find with the naked eye, but it can be (R. 216). He testified, further, that edema of the brain, in his opinion, was not normal (R. 211), and edema of the brain is an almost immediate effect in cases where there is electrical damage to the cerebral tissue (R. 218); that the finding of lymphocytes in the perivascular system is not indicative of a normal death (R. 211); that there was a very recently reported case of electrical death where the only brain change found was perivascular infiltration and edema of the brain (R. 211, 212, 221); that perivascular lymphocytes are indicative of an acute condition with respect to electric shock, and may pour out into the brain quickly and persist for weeks (R. 221); that different persons receiving the same electrical shock have different resistance and different results to different organisms of the body (R. 212, 222), and that persons who sustain electric shock have what is known as "hallucinary flashes," there being hallucinary symptoms of light, lightning, or what not, although those things have not actually occurred (R. 212).

He further testified that, in his opinion, if there were subarachnoid hemorrhages, however slight, together with edema, petechial hemorrhages throughout the brain, lymphocytes and perivascular changes of tissue, that would indicate effectively that electricity was the cause of death (R. 218-219); but that he did not mean that the presence of petechial hemorrhages of the brain points unerringly to electric shock, and, while they occurred in some other types of cases, he would not say that they were the result of "lots of other causes" (R. 219).

Such other facts as it may be necessary to refer to in connection with the points involved will be adverted to in our argument herein.

SUMMARY OF THE ARGUMENT.

I.

(A) The decision and holding of the Supreme Court of Missouri in the case at bar, to the effect that reliance upon the doctrine of res ipsa loquitur may be had in an action under the Federal Employers' Liability Act, is not in conflict with any decision of this Court, and is supported by an unbroken line of decisions in the other federal courts.*

(B) The decision and holding of the Supreme Court of Missouri in the case at bar, to the effect that the doctrine of res ipsa loquitur is applicable where a person using, in the usual manner, a telephone which is in the exclusive control of another, receives a shock from the telephone, is not in conflict with any decision of this Court, and is supported by numerous decisions of this and other courts.**

II.

The decision and holding of the Supreme Court of Missouri in the case at bar, to the effect that there was substantial evidence requiring submission to the jury of the issue of whether respondent's intestate died as the result of an electric shock, is not in conflict with any decision of this Court, and is fully supported by the record evidence. The direct and positive opinion of respondent's medical expert, Dr. Siebert, to the effect that deceased's death was caused by electric shock (R. 49, 52, 53), being based upon Dr. Siebert's pathological examination of deceased's body, was competent and substantial evidence on that issue, and required submission of that issue to the jury.

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*The decisions referred to are cited in our argument herein, post, pp. 30-31.

**The decisions referred to are cited in our argument herein, post, p. 27.

III.

The decision and holding of the Supreme Court of Missouri in the case at bar, to the effect that there was substantial evidence requiring submission to the jury of the issue of whether respondent's intestate received an electric shock from petitioner's telephone, is not in conflict with any decision of this Court, and is fully supported by the record evidence.

IV.

The decision and holding of the Supreme Court of Missouri in the case at bar, to the effect that there was substantial evidence requiring submission to the jury of the issue of negligence on the part of petitioner, was not in conflict with any decision of this Court, but, on the contrary, is in full accord with the decisions of this Court,† and of other courts, which rule that the application of the doctrine of res ipsa loquitur permits an inference of negligence on the part of the one having control of the instrumentality involved, and makes the question of his negligence one for the determination of the jury.

†The decisions of this Court referred to are cited in our argument herein, post, p. 42.

ARGUMENT.

I.

In its opinion and decision in the case at bar (Benner v. Terminal R. R. Assn. of St. Louis [Mo. Sup.], 156 S. W. 2d 657), the Supreme Court of Missouri clearly ruled that the doctrine of res ipsa loquitur may be applied in an action under the Federal Employers' Liability Act (45 U. S. C. A., §§ 51-60, as amended), and applied that doctrine to the facts in this case, which was, concededly, one governed and controlled by that act (R. 9). Of this is constituted petitioner's first complaint here.

We see no need to defend here either the existence or the propriety of the doctrine of res ipsa loquitur, as both have been fully recognized and accepted by this Honorable Court in several well-considered cases (Cf. Gleeson v. Virginia Midland R. Co., 140 U. S. 435, 11 S. Ct. 859, 35 L. ed. 458; San Juan Light and Transit Co. v. Requena, 224 U. S. 89, 32 S. Ct. 399, 56 L. ed. 680; Sweeney v. Erving, 228 U. S. 233, 33 S. Ct. 416, 57 L. ed. 815). The conditions under which the doctrine of res ipsa loquitur is applicable were concisely stated by this Court in San Juan Light and Transit Co. v. Requena, supra, wherein it was said:

> "* * * when a thing which causes injury without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care" (224 U. S., l. c. 98-99).

It is manifest that the facts of the case at bar fit exactly the requirements set out in the foregoing quotation for the application of the doctrine of res ipsa loquitur, because

(1) there is no contention or pretense that the respondent's intestate Benner was guilty of any negligence; (2) the petitioner railway concededly had full and exclusive control of all of the telephone devices and appliances which produced the occurrence resulting in the death of respondent's intestate (R. 20), and (3) the occurrence and the injury were such as in the ordinary course of things do not occur if ordinary care is exercised by the one having such control. It is, accordingly, well settled that, where, as here, a person is lawfully using a telephone which is in the exclusive control of another, and sustains injury caused by electric shock from that telephone, the doctrine of res ipsa loquitur is applicable (Cf. Warren v. Missouri & Kan. Tel. Co., 196 Mo. App. 549, 196 S. W. 1030, 1032 [6], cited and approved in Foster v. Kansas City, C. C. & St. J. R. Co., 325 Mo. 18, 26 S. W. 2d 770, 772, and in Kaemmerling v. Athletic Mining & Smelting Co., 8 Cir., 2 F. 2d 574, 582; Joyce v. Missouri & Kansas Tel. Co. [Mo. App.], 211 S. W. 900, 901 [3], cited and approved in Hellweg v. Chesapeake & Potomac Telephone Co. [App. D. C.], 110 F. 2d 546, 547; Shoemaker v. Mountain States Tel. & Tel. Co. [D. C. Idaho], 17 F. Supp. 591, 593 [2]; Cain v. Southern Mass. Tel. Co., 219 Mass. 504, 107 N. E. 380, 381 [2], and Delahunt v. United Tel. & Tel. Co., 215 Pa. 241, 64 Atl. 515, 517 [1]. See, also, San Juan L. & T. Co. v. Requena, 224 U. S. 89, 32 S. Ct. 399, 56 L. ed. 680).

Petitioner railway, however, contends that this Court should undertake a review of the opinion and decision of the Supreme Court of Missouri in the case at bar because, it asserts, this Court has ruled that the doctrine of res ipsa loquitur is not applicable in a servant's action against his master for injury sustained in the course and scope of his employment, and, further, because there is a sharp division of opinion among the lower federal courts as to whether the doctrine of res ipsa loquitur is applicable in such cases.

We are unable to find any decision of this Court which passes upon the question of whether the doctrine of res ipsa loquitur may be applied in an action by a servant against his master for injuries sustained in the course and scope of his employment, and, certainly, petitioner railway company has cited no such a case, because the decisions of this Court which petitioner does cite—Patton v. Texas & P. R. Co., 179 U. S. 658, 21 S. Ct. 275, 45 L. ed. 361, which involved an injury to a railroad fireman from a fall from a defective step on an engine; Looney v. Metropolitan R. Co., 200 U. S. 480, 26 S. Ct. 303, 50 L. ed. 564, which involved an injury to a street railway "pitman" from electric shock while engaged in making the transition of the power supply on an electric street car from an underground system to an overhead system; and New Orleans and N. E. R. Co. v. Harris, 247 U. S. 367, 38 S. Ct. 535, 62 L. ed. 1167, which involved an injury to a brakeman from being struck and run over by the tender of a moving locomotive—are all cases in which there was a total failure to meet the requirements for the application of the doctrine of res ipsa loquitur, irrespective of the existence of the relationship of master and servant, and in which, accordingly and under the general rule, the fact of the occurrence and the injury carried with it no presumption or inference of negligence on the part of the master.

With the qualification that such contention is applicable only to ordinary common-law cases involving a servant's action against his master for injuries sustained by the servant in the course and scope of his employment, as distinguished from actions under the Federal Employers' Liability Act, we readily concede petitioner railway's assertion that "there is a sharp division of opinion among the various Federal Circuit Courts of Appeals * * * as to whether or not the res ipsa loquitur theory ever applies to an action between servant and the master * * *" (Peti-

tioner's brief, p. 21). We need not, however, undertake any extended discussion of that division of opinion, because, even if it be accepted as the rule that the doctrine of res ipsa loquitur is not applicable in ordinary common-law cases between servant and the master for injuries sustained by the servant, the reason for that rule fails, and the rule itself fails, in actions brought under the Federal Employers' Liability Act.

In those decisions of the various Circuit Courts of Appeals which rule that the doctrine of res ipsa loquitur is not applicable in a servant's action against his master for injuries sustained in the course and scope of his employment, the reasons given for so holding are that, because of the variety of risks assumed by an employee at common law, including the risks of negligence of a fellow servant, and because under the common law an employee is barred completely from recovery for injury produced in part by his contributory negligence, the mere happening of an occurrence which causes an injury to a servant does not indicate whether it resulted from a risk so assumed, whether it was produced in part by contributory negligence of the injured employee, or whether it was produced by cause for which the master was liable, and, therefore, raises no presumption or inference of actionable negligence on the part of the employer (Northern Pacific R. Co. v. Dixon, 8 Cir., 139 F. 737, 740, cited and quoted in Kaemmerling v. Athletic Mining & Smelting Co., 8 Cir., 2 F. 2d 574, 581; Iarussi v. Missouri Pacific R. Co. [C. C. Ill.], 155 F. 654, affirmed 7 Cir., 161 F. 66). The Federal Employers' Liability Act, however, abrogates the common-law doctrines of assumption of risk and contributory negligence as a bar to a recovery by an injured employee; by section 1 of that act (45 U. S. C. A., § 51, as amended), the fellow servant rule is abrogated, and the master specifically is made liable for injury to a servant resulting from the negligence of a

fellow servant, by the placing of the negligence of a fellow servant upon the same basis as the negligence of the master (Kanawha & Michigan R. Co. v. Kerse, 239 U. S. 576, 580, 36 S. Ct. 174, 60 L. ed. 448; Chesapeake & O. R. Co. v. DeAtley, 241 U. S. 310, 313, 36 S. Ct. 564, 60 L. ed. 1016); by section 3 of the act (45 U. S. C. A., § 53), the contributory negligence rule is abrogated by specific provision that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery" (Illinois Central R. Co. v. Skaggs, 240 U. S. 66, 70, 36 S. Ct. 249, 60 L. ed. 528; St. Louis & S. F. R. Co. v. Brown, 241 U. S. 223, 228, 36 S. Ct. 602, 60 L. ed. 966); and by section 4 of the act (45 U. S. C. A., § 54, as amended), assumption of risk by an employee, again and specifically, is abolished as an affirmative defense. As a result of the abrogation of these doctrines by the Federal Employers' Liability Act, the reasons for the rule—if it be the rule—that the doctrine of res ipsa loquitur is not applicable to cases between servant and master, fails completely.

Accordingly, and as a result of the same reasoning as is heretofore advanced, an unbroken line of decisions of the lower federal courts supports the proposition that, if the facts are such as to bring the case within that doctrine, the doctrine of res ipsa loquitur may be applied in an action under the Federal Employers' Liability Act (Southern R. Co. v. Derr, 6 Cir., 240 F. 73; Central R. Co. of N. J. v. Peluso, 2 Cir., 286 F. 661, certiorari denied 261 U. S. 613, 43 S. Ct. 359, 67 L. ed. 827; Baltimore & O. R. Co. v. Kast, 6 Cir., 299 F. 419, certiorari denied 266 U. S. 613, 45 S. Ct. 95, 69 L. ed. 468; Erie R. Co. v. Murphy, 2 Cir., 9 F. 2d 525; Cochran v. Pittsburgh and L. E. R. Co. [D. C. Ohio], 31 F. 2d 769; Chesapeake & O. R. Co. v. Smith, 6 Cir., 42 F. 2d 111, certiorari denied 282 U. S. 856, 51 S. Ct. 32, 75 L. ed. 758; Lowery v. Hocking Valley R. Co., 6 Cir., 60 F. 2d 78; Carpenter v. Baltimore & O. R. Co., 6 Cir., 109 F. 2d 375;

Eker v. Pettibone, 7 Cir., 110 F. 2d 451; Terminal R. Assn. of St. Louis v. Staengel, 8 Cir., 122 F. 2d 271, certiorari denied 314 U. S. ..., 62 S. Ct. 181, 86 L. ed. [Advance Sheets] 98), all of which find much support in the decision of this Court in Southern R. Co. v. Bennett, 233 U. S. 80, 85, 34 S. Ct. 566, 58 L. ed. 860, as well as in numerous decisions of various of the state courts.*

Since the opinion and decision of the Supreme Court of Missouri in the case at bar is in complete harmony with a well-settled and unbroken line of decisions of the various Circuit Courts of Appeal and the other lower federal courts, and is not in conflict with any decision of this Court, in holding the doctrine of res ipsa loquitur to have been applicable to respondent's action under the Federal Employers' Liability Act, it appears that there is no reason for the issuance of a writ of certiorari in the case at bar. Furthermore, as recently as on November 10, 1941, in Terminal R. Assn. of St. Louis v. Staengel, 314 U. S. ..., 62 S. Ct. 181, 86 L. ed. (Advance Sheets) 98, this Honorable Court denied certiorari sought by this same petitioner upon the same ground as that upon which it now seeks certiorari in the case at bar.

II.

Petitioner next asserts that the medical evidence was such as to fail to make a showing that the death of respondent's intestate was caused by electric shock. We have stated the medical evidence offered on behalf of plaintiff-respondent in considerable detail in our statement in this brief, and we will not undertake to again do so here.

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*Compare: Williams v. St. Louis-S. F. R. Co., 337 Mo. 667, 85 S. W. 2d 624; Noce v. St. Louis-S. F. R. Co., 337 Mo. 689, 85 S. W. 2d 637; Baltimore & O. S. W. R. Co. v. Hill, 84 Ind. App. 354, 148 N. E. 489, certiorari denied 273 U. S. 738, 47 S. Ct. 246, 71 L. ed. 867; Hackley v. Southern Pac. Co., 6 Cal. App. 2d 211, 45 P. 2d 447, certiorari denied 296 U. S. 630, 56 S. Ct. 153, 80 L. ed. 447; Deputla v. Pennsylvania R. Co., 110 N. J. Law 515, 166 A. 87, certiorari denied 290 U. S. 643, 54 S. Ct. 62, 78 L. ed. 559; Manning v. Chicago G. W. R. Co., 135 Minn. 229, 160 N. W. 787; Moore v. Grand Trunk R. Co., 93 Vt. 383, 108 A. 334; Ridge v. Norfolk S. R. Co., 167 N. C. 510, 83 S. E. 762.

We will, however, undertake to epitomize that evidence here in such manner that the Court may have an understanding of the essentials to the question now presented.

The substance of the testimony of Dr. John J. Connor, the Coroner's physician, was that, at the autopsy, he found subarachnoid hemorrhages and edema of the brain of respondent's decedent; that he also found evidence of pressure of the calvarium, or skull bone, on the surface of the brain (R. 44); that, in his opinion, the edema followed the hemorrhages, and caused the pressure; that these hemorrhages and edema "will" produce a paralysis of one side of the body (R. 26, 45), known as "hemiplegia"; that he could not say that these changes in the brain resulted from electric shock, so as to tell the jury that it was his opinion that Benner died of electric shock; and that, in order to form an opinion on that matter, he would want the benefit of a microscopic examination.

The substance of the testimony of Dr. Walter J. Siebert was that, subsequent to the autopsy made by Dr. Connor, he (Dr. Siebert) made a post-mortem examination, including a microscopic examination, of the vital organs of deceased's body; that, excepting for the brain, those organs showed no changes which could in any way enter into the cause of death; that he examined the brain grossly, observed that a "pressure collar" existed where intracranial pressure had pressed the cerebellar tissue down into the opening of the skull which surrounds the spinal cord, and also observed the cuts or slices made in the brain at about two-inch intervals when Dr. Connor had performed the earlier autopsy; and that he (Dr. Siebert) then made many more cuts or slices in the brain, at intervals of about one-fourth inch, in order to make a better and closer gross examination. He further testified that he made several microscopic sections from the various vital organs—eight of such sections being made from the brain—and that he made these sections from those areas of the organs which

were "most likely to show microscopical change" (R. 49, 76-77); that he made standard sections or "slides," as he deemed advisable, having in mind the gross pathology and other things present indicative of injury (R. 84); that he did not make any sections or slides "directly through the internal capsule" of the brain (R. 64), because he saw nothing in the internal capsule which indicated that a section should be made through it (R. 77); that the internal capsule was grossly normal (R. 77); that any injury to the internal capsule which would have entered into the cause of death, so as to have indicated or required miscroscopic study, would have evidenced itself grossly (R. 77-78);* that his microscopic study of the brain sections made by him disclosed numerous pathological changes in the brain (detailed in our statement, ante, pp. 15-16), each of which, with the exception of a certain change described by Yaffe as peculiar to electrical injury to the brain (R. 52), and the absence of body reaction about the degenerative areas (R. 68-69), separately and alone would not be indicative of death by electrical shock, but which, *in the peculiar combination found by him*, indicate very strongly that electrical injury to the brain had occurred (R. 51-52). He then testified, with respect to the brain changes, as follows:

> "Q. Doctor, * * * aside from the use of all this terminology, I want to ask you again, do all of these things that you have suggested here, do they **typify a case of an electric shock where death is caused by that? A. Yes, they do, very definitely**" (R. 53),

after having previously testified with respect to the sections made by him, brain and otherwise, as follows:

*This is in complete harmony with the testimony of petitioner's experts, which was to the effect that, in order for an embolus or thrombus in the internal capsule to produce a condition such as Benner had, it would have to be as large as a pea, with a larger surrounding area of softening (R. 91, 190).

> "The conclusions that I drew from the study of these microscopic sections indicated that **this man died of an electric shock,** and that there were no chronic diseases which could have caused death" (R. 49).

He further testified that his opinions were entirely consistent with the onset and progress of deceased's condition, and gave his reasons for such consistency (R. 53-55).

That Dr. Siebert's opinion, that Mr. Benner's death resulted from electric shock, was proper opinion evidence, is demonstrated by the language in De Donato v. Wells, 328 Mo. 448, 41 S. W. 2d 184, 187, wherein it is said:

> "It is proper for a medical expert to testify and give his opinion either from facts within his knowledge or observation or from hypothetical facts, or from the two combined."

Likewise, in O'Leary v. Scullin Steel Co., 303 Mo. 363, 260 S. W. 55, 59, the Court quoted with approval from the decision in Wood v. Metropolitan St. Ry. Co., 181 Mo. 433, 452, 81 S. W. 152, 157, as follows:

> "It is well settled that **the opinion of the medical experts as to the cause of death are admissible, such opinions being founded either upon the personal knowledge of the facts of the case,** or upon a statement of the nature of the injury or symptoms and nature of the disease as testified to by others." (Emphasis ours.)

Furthermore, in Phares v. Century Electric Company, 336 Mo. 961, 82 S. W. 2d 91, 95, and Kimmie v. Terminal R. Assn., 334 Mo. 596, 66 S. W. 2d 561, 564, upon the authority of the decision in Cropper v. Titanium Pigment Co., 8 Cir., 47 F. 2d 1038, it was succinctly said:

> **"The opinion of a medical expert based upon examination * * * is substantial evidence, and its weight is for the jury."** (Emphasis ours.)

To like effect are Corbett v. Terminal R. Assn., 336 Mo. 972, 82 S. W. 2d 97, 103; Pedigo v. Roseberry (Mo. Supp.), 102 S. W. 2d 600, 605; Scanlon v. Kansas City, 325 Mo. 125, 28 S. W. 2d 84, 95-96; Svenson v. Mutual Life Ins. Co. of N. Y., 8 Cir., 87 F. 2d 441, 444-445.

Under these authorities, and in the light of the indisputable rule that in determining a defendant's motion for a directed verdict the plaintiff is entitled to the benefit of all of the evidence favorable to him and all of the inferences favorable to him which reasonably may be drawn from the evidence (Gunning v. Cooley, 281 U. S. 90, 94, 50 S. Ct. 231, 74 L. ed. 720; Lumbra v. United States, 290 U. S. 551, 553, 54 S. Ct. 272, 78 L. ed. 492; Western Atlantic R. Co. v. Hughes, 278 U. S. 496, 498, 49 S. Ct. 231, 73 L. ed. 473; Best v. District of Columbia, 291 U. S. 411, 415, 54 S. Ct. 487, 78 L. ed. 882), there can be no doubt about the fact that Dr. Siebert's unequivocally expressed opinion, that the death of respondent's decedent was caused by electric shock, being founded upon Dr. Siebert's pathological examination of deceased's body, was substantial evidence that deceased did die as the result of electric shock, and the weight and effect of such evidence was for the determination of the jury.

Of a certainty, too, there is nothing incredible or unbelievable in the testimony of Dr. Siebert above discussed, notwithstanding petitioner's carping criticism of it. Dr. Siebert was, and is, indisputably, a well qualified pathologist, having studied in Europe, Washington, and New York, and at Johns Hopkins in Baltimore, and having been connected with Washington University—one of the leading medical schools in the country — as instructor and associate professor of pathology (R. 47-48).

Was the effect of Dr. Siebert's testimony destroyed by the testimony of petitioner's medical experts? That it could not be as a matter of law, without the Court undertaking to weigh the evidence and the credibility of the

witnesses—which is not the function of a Court and which is the exclusive function of the jury in a law case—is obvious. That it did not, is manifest if we but recall that it was petitioner's *theory* that the deceased died as the result of a thrombus or embolus of the internal capsule of the brain (Petitioner's Petition here, p. 8); that, even according to petitioner's experts, such a thrombus or embolus would have to be as large as a pea, with a larger surrounding area of softening (R. 91, 190), so as to be visible to anyone making a proper gross examination of the brain; and that Dr. Siebert, who made a careful gross examination of the brain which would have disclosed such a condition (R. 73-75, 77)—and who was the only person who made such an examination—found no such condition. There is, simply, no substantial evidence to support petitioner's theory.

We see no reason to carry on any extended discussion about the fact that Dr. Siebert's testimony with respect to some details—as for example, the existence of a "pressure collar" on deceased's brain, the nonexistence of damage to the internal capsule of the brain, and as to the time the hemorrhages of the brain occurred—was not in full accord with *the opinions* of the various doctors who testified as witnesses for the petitioner. It must be remembered that Dr. Siebert had the distinct advantage of having the benefit of an actual and extensive examination of deceased's brain, while none of petitioner's witnesses ever saw it. Under such circumstances, it is manifest that Dr. Siebert had the better foundation for testimony as to both the conditions which existed in the brain, and an opinion as to the cause of death, formed from those conditions.

The petitioner's complaint with respect to the matter now under discussion is, in reality, nothing more than its petulance from the fact that the jury saw fit to accept the testimony of plaintiff's witnesses rather than that of peti-

tioner's witnesses. The mere fact that there was some conflict in the medical evidence, however, does not justify the rejection of the direct, positive and substantial evidence of Dr. Siebert to the effect that the deceased's death was caused by electrical shock (R. 49, 53), and the situation here presented is substantially identical with that presented in London Accident & Guarantee Co. v. Woelfle, 8 Cir., 83 F. 2d 325, 337, where it was said:

> "The defendant urges us to disregard the opinions of the plaintiff's experts on the ground that they are unreasonable and absurd, and to accept those of its experts. * * * The same argument as is made by the defendant was made in Mutual Life Ins. Co. of New York v. Still (C. C. A. 8), 78 F. (2d) 748, where an insured with a diseased gall bladder developed a degeneration of the liver following a fall. The court said [78 F. (2d) 748, at page 750]:
>
> " 'In this case, the expert testimony was directly in conflict. The court below could not say, nor can we say that it conclusively appears from the medical evidence that the degeneration of the insured's liver was not due to the accident, but was caused, in whole or in part, by infection from the gall bladder. The existence of the disease and the causes of the disease were medical questions. United States v. Clapp (C. C. A. 2), 63 F. (2d) 793, 794; Aetna Life Ins. Co. of Hartford, Conn., v. Kelley (C. C. A. 8), 70 F. (2d) 589, 593, 93 A. L. R. 471.
>
> " 'Whether the death of the insured was caused by the accident or wholly by the diseased gall bladder, or partly by the accident and partly by the diseased gall bladder, was, under the evidence, clearly for the jury to determine, and the jury's finding is conclusive * * *.' "

We most respectfully submit that, for the reasons and upon the authorities hereinbefore referred to, there is in the record in this case ample, substantial evidence that the

death of respondent's intestate resulted from electric shock, petitioner's contention to the contrary notwithstanding.

III.

Petitioner next asserts that the evidence was such as to fail to make a showing that the respondent's intestate, Benner, received a shock from the telephone.

The record is, literally, full of evidence showing that the deceased received a shock from the telephone, and from no other source. The evidence showed that, while the deceased was using, and having a conversation over, the telephone in question, there was an unusual clicking noise in the telephone heard by the person with whom he was having his conversation; that the telephone receiver was dropped by him, his conversation was temporarily interrupted, and he exhibited physical symptoms apparent to a layman that something unusual had occurred to him; that, upon resuming his telephone conversation shortly thereafter, he immediately said that he had received a shock to his hand, and, thereafter, repeatedly told others that "that phone shocked him" and that he had received a shock "from the telephone" and "on the telephone" (R. 12, 18, 107-108, 124, 126, 128, 131, 132, 133, 134, 136). The evidence further showed that the engineer and other members of the deceased's crew, who were within forty feet of him, saw no flash of lightning and heard no thunderclap which would necessarily accompany such a flash of lightning as would have occurred had decedent, or the telephone pole near which he was standing, been struck directly by lightning. Petitioner's testimony respecting inspections made of its pole and instrumentalities where this telephone was located—which was the only testimony in that connection—wholly failed to disclose any evidence that lightning had struck the pole, and passed from there onto deceased, or had directly struck the telephone instru-

ments located there (R. 166, 168), **but such inspection did disclose burns and smudges on the carbon blocks in the lightning arrester indicating that an excessive charge of electricity had struck the line wire and passed through the telephone system,** and jumped the air gap between the carbon blocks in the arrester (R. 159).* Furthermore, the undisputed medical evidence established that deceased had not been struck directly by lightning (R. 80-82).

The fact of the matter is that there is no evidence in the record that Benner got a shock from any place other than the telephone instrument, notwithstanding petitioner's evidence that Benner had said, "Fire come down the pole" (R. 135). This statement, attributed to Benner by one of petitioner's witnesses, if given such a strained construction as to mean that Benner was struck either directly by a bolt of lightning, or by a bolt of lightning which came down the pole but did not pass through the telephone instrument, is inconsistent with all of the evidence just above referred to, and also inconsistent with petitioner's other evidence to the effect that Benner stated that "the wires had been struck by lightning" (R. 107-108)—in which event it was for the jury to say whether Benner had received the shock which he did receive from the telephone or otherwise. However, if Benner made the statement that "Fire come down the pole," the making of such a statement by him is fully explained by the undisputed evidence that persons who suffer an electric shock have "hallucinary flashes" or "symptoms of light, lightning or what not," even though there has been none (R. 212).

There are three immutable facts, which come from the testimony of petitioner's employee-witness Wunder, and which not only corroborate Benner's statements that he received a shock from the telephone, but preclude his having received it from any other source. These facts are:

*The undisputed evidence showed that it would take an electrical charge of at least 400 volts to jump the air gap between the carbon blocks of the lighting arrester on this telephone (R. 234).

[1] that the carbon blocks from the lightning arrester exhibited at the trial contained "burns" and "smudges," which were tell-tale evidence that an excessive charge of electricity—in excess of 400 volts—had passed through the telephone system where Benner was using this telephone, such excessive charge having presumably gotten into the telephone instrument through the line wire, and passed down it to the telephone instruments here involved (R. 159, 161-162, 163); [2] that, had Benner received a shock from lightning striking the pole on which the telephone instrument was situated, there would have been no evidence that an excessive charge had passed through the telephone instruments (R. 165); and [3] that an inspection of the pole there disclosed no marks or evidence that it, or anything in its immediate vicinity, had been struck by lightning (R. 166, 168).

Obviously, the petitioner's assertion that the evidence was insufficient to show that the deceased received a shock by way of petitioner's telephone, is clearly and unequivocally refuted by the foregoing evidence. Was there any evidence offered by petitioner which would, as a matter of law, destroy the effect of the foregoing evidence? Petitioner's evidence showed no more than that, if its telephone system was functioning properly, a person using the telephone could not receive a shock from it at any time under any weather conditions (R. 154-156, 164-165); that the fuses in the arrester device were not blown, and the telephone system showed no evidence of damage other than the presence of "burns" and "smudges" on the carbon blocks in the lightning arrester (R. 169, 161); and that it would take an electrical charge of from 35,000 to 40,000 volts for one to receive a shock through the receiver or the generator crank handle of the telephone (R. 171). **This evidence does not, however, refute or explain away the undisputed evidence that persons had received shocks from this telephone on three separate occasions**—petition-

er's conductor, Kroeck, indisputably having received a severe shock from it a few minutes before (R. 113, 114, 118, 122), and another on an occasion some months after (R. 113, 122, 223-224), Benner received a shock from it. If these shocks were received—and the evidence that they were is undisputed and leaves no room for doubt about the matter—there must have been something wrong with the telephone instrumentalities which petitioner's inspection, or its witnesses who made them, failed to disclose. If these shocks were received, then there is an inconsistency between petitioner's evidence that such incidents could not occur if its telephone system was in order and functioning properly, and its evidence that the telephone system was in order and functioning properly. If these shocks were received, then there is an inconsistency between petitioner's evidence that it would take a voltage of at least 35,000 to 40,000 volts for one to receive such shocks, and its evidence that, although an electrical charge of unknown intensity, but in excess of 400 volts, had passed through the telephone lightning arrester, no "heavy charge" of electricity could, or did, pass through the telephone instrumentalities.

The fact that the fuses in the lightning arresting device were not blown does not prove anything in this case, because the undisputed evidence established that such fuses were of 7-ampere capacity, and would not protect against a death-dealing current which would be one of between .08 ampere and .20 ampere (R. 232-233).

Likewise, the testimony of petitioner's yardmaster Jenkins, to whom Benner was talking on the telephone when Benner received his shock, to the effect that Jenkins received no shock (R. 125), proves nothing in this case. Jenkins was, at the time, in the yardmaster's office, and was the recipient of additional protection afforded by his being upon a dry floor inside an office building and not upon wet ground (R. 225-226). Furthermore, this testi-

mony of Jenkins, which is so strongly relied upon by petitioner, is hardly consistent with his admission that he told Benner that he (Jenkins) received a shock at the same time that Benner did (R. 125).

Manifestly, there was ample evidence in the record that respondent's intestate, Benner, received an electric shock from the petitioner's telephone which resulted in his death. Petitioner's evidence tending to establish the contrary was not such as to preclude Benner's having received such a shock, and the conflict in the evidence, if any there was, was for the determination of the jury.

IV.

Petitioner's final contention is that the evidence failed to establish negligence on the part of the petitioner.

This assertion utterly ignores the authorities which we have heretofore cited (ante, p. 27) to show that the doctrine of res ipsa loquitur applies where a person is lawfully using, in the usual manner, a telephone which is in the exclusive control of another, and sustains injury caused by electric shock from that telephone, and overlooks, as well, that the application of the doctrine of res ipsa loquitur permits an inference of negligence on the part of the one having such control of the instrumentality, and makes the question of his negligence one for the determination of the jury (Cf. San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 32 S. Ct. 399, 56 L. ed. 680; Sweeney v. Erving, 228 U. S. 233, 33 S. Ct. 416, 57 L. ed. 815; Gleeson v. Virginia Midland R. Co., 140 U. S. 435, 11 S. Ct. 859, 35 L. ed. 458).

The evidence offered by the petitioner in the case at bar did not furnish such an "explanation" of Benner's having received a shock from its telephone as would exculpate petitioner from negligence; its evidence did no more than to tend to establish that a person could not have received a

shock from its telephone; and that evidence was contradicted, not only by the evidence tending to establish that Benner did receive such a shock, but by the undisputed evidence that petitioner's conductor, Kroeck, was shocked by this same telephone on two occasions, one just a few minutes before, and the other some months after, Benner was shocked. The situation here is similar to that involved in Terminal R. Assn. of St. Louis v. Staengel, 8 Cir., 122 F. 2d 271 (certiorari denied 314 U. S. ..., 62 S. Ct. 181, 86 L. ed. 98), wherein it was said:

> "To justify directing a verdict, the Court must be compelled to the conclusion that reasonable minds could not differ as to the lack of negligence of defendant. This it must do here in the face of an actual occurrence conclusively showing defective operation of the switch which is entirely devoid of explanation. We have no doubt that such conclusion is not compelled. The evidence here does not bring this case within that slight weakening (announced by this Court in the Hussey case) of the rule that no verdict can be directed in a res ipsa loquitur case. It does not furnish the 'explanation' required by the Requena case" (122 F. 2d, l. c. 275);

and further:

> "The situation is most unusual. The jury might be justified in believing all or any part of this evidence and, therefrom, exculpating defendant. The trial court was not entitled to direct the jury that all of such evidence must be true and, much less, that it cleared defendant of all blame" (122 F. 2d, l. c. 276).

The situation here is almost identical with the situation in Warren v. Missouri & Kansas Tel. Co., 196 Mo. App. 549, 196 S. W. 1030, 1032-1033, wherein it was said:

> "The defendant owning and controlling this telephone and all the appliances used in connection therewith installed it * * * for plaintiff's use at all

times without regard to weather conditions. The defendant company in effect said to plaintiff that, while we know the ordinary danger of lightning passing along wires such as connect with this phone, especially during thunderstorms, that is our business, and we will guard against it; you may use this phone regardless of weather conditions, and we will see that same is safe in so far as the highest degree of skill and care commensurate with the danger will make it so. That the doctrine of res ipsa loquitur applies in such cases is attested by many authorities. Jones on Telegraphs and Telephones, § 198; Curtis' Law of Electricity, §§ 597, 594; 1 Joyce on Electric Law, §§ 445a, 445f; 2 Joyce on Electric Law, § 1048, p. 1551; Griffith v. New England T. & T. Co., 72 Vt. 441, 48 Atl. 643, 52 L. R. A. 919; Southern Bell Telephone Co. v. McTyer, 137 Ala. 601, 34 South. 1020, 97 Am. St. Rep. 62; Alabama City etc. Co. v. Appleton, 171 Ala. 324, 54 South. 638, Ann. Cas. 1913 A, 1181; Evans v. E. Kentucky Tel. & Tel. Co., 124 Ky. 620, 99 S. W. 936; Denver Con. Elec. Co. v. Lawrence, 31 Colo. 301, 73 Pac. 39; Hoover v. Railroad Co., 159 Mo. App. 416, 420, 140 S. W. 321; Heiberger v. Telephone Co., 133 Mo. App. 452, 113 S. W. 730. In Byron Telephone Co. v. Sheets, 122 Ill. App. 6, 10, the court said:

"'Its dangerous character is generally known, but the means by which its dangers are minimized are only known to those who have special knowledge and skill. In the absence of stipulations to the contrary, those who engage in the business of serving the public with telephones must be held to possess and employ the requisite knowledge and skill to protect its patrons, so far as practicable, from the dangers incident to the business, whether those dangers arise from the currents employed by them or such as may reasonably be expected to get on the wires from other sources.'

* * * * * * *

"The defendant introduced evidence tending to show absence of negligence on its part; that it used a high

degree of care in maintaining and operating its telephone system, and had in use safety appliances, such as lightning arresters, fuses, etc.; that there was no discovered defect in these appliances. Without quoting or commenting on this evidence it is sufficient to say that it is yet a question for the jury to say whether defendant had discharged the burden of proof cast upon it. The credibility of the explanation and its sufficiency were questions for the jury, and the prima facie case of the plaintiff is not necessarily overthrown by uncontradicted evidence that the appliances were constructed and operated in a proper manner. Curtis' Law of Electricity, § 592, p. 902; Kelly v. City, 185 Mo. App. 55, 60, 171 S. W. 966."

In Joyce v. Missouri & Kansas Tel. Co. (Mo. App.), 211 S. W. 900, 901, the facts were similar to those in the case at bar, and there it was said:

"The evidence was abundant that plaintiff's injury was caused by an electric shock; and it was well near as strong (if we allow for legitimate inferences) that the electricity was that artificial electric current used by defendant in running its plant. And, in addition to this the proof was such that, even though the current was the natural kind manifested in storms (there was some evidence of electric disturbance), yet defendant was negligent in not having in proper use the equipment which protects telephone instruments and patrons from lightning. So, in any event, a case was made against defendant. For applying the rule res ipsa loquitur to the evidence it raised the presumption of defendant's negligence, and made a prima facie case for plaintiff which the jury has not believed defendant has explained away.

* * * * * * *

"It is well said in the brief for plaintiff that, having shown by legal evidence the cause of plaintiff's injury to have been an electric shock received from defendant's telephone instrument, a presumption of other

additional matter arises, viz., negligence of the defendant. That is to say, the rule of res ipsa loquitur finds application.

"And that such rule may be applied to such character of case, that is, to injuries received from such source, is well attested by authority."

We believe that, under the foregoing authorities, the evidence in the case at bar clearly made a submissible case of negligence on the part of petitioner railway.

CONCLUSION.

For the reasons and upon the authorities hereinbefore referred to, we most respectfully submit that the case at bar is one to which the doctrine of res ipsa loquitur is applicable, and that there is in the record ample substantial evidence requiring submission to the jury of all the factual issues essential to a recovery by plaintiff-respondent under that doctrine. Accordingly, the opinion and decision of the Supreme Court of Missouri in the case at bar, which so holds, was entirely correct and proper, is not in conflict with any decision of this Court, and is not in conflict with any decision of any of the various Circuit Courts of Appeals. It follows that the issuance of a writ of certiorari in this case could serve no useful purpose, and that petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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